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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

VS.

JIMMY PAUL BESSE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Should Missouri courts be required to give retroactive effect to the decision of *St. Louis-Sourthwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985) in cases arising under the Federal Employers' Liability Act where the trial court has failed to instruct the jury on present value?

2. Should the "cause and prejudice" standard applied to state procedural defaults in federal habeas corpus cases be applied by analogy to the failure to request a jury instruction on present value in a civil case arising under the Federal Employers Liability Act where state jury instruction practice to the contrary had been firmly entrenched until this Court's decision in *St. Louis -Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985)?

3. Should the "clear break" exception to the general rule that an appellate court must apply new decisions retroactively be abolished in civil cases?

LIST OF PARTIES BELOW

All parties to the proceedings below are listed in the caption of this petition. Petitioner Missouri Pacific Railroad Company is a wholly owned subsidiary of the Union Pacific Corporation, a publicly traded holding company. Missouri Pacific Railroad Company's subsidiaries and affiliates are as follows:

Alameda Belt line
Alton & Southern Railway Company
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and Terminal Company
Belt Railway of Chicago
Bitter Creek Coal Company
Brownsville & Matamoros Bridge Company
CMT Ltd.
Calnev Pipe Line Company
Camas Prairie Railroad Company
Central California Traction Company
Champlin Alaska Pipeline, Inc.
Champlin Arguello Pipeline, Inc.
Champlin Canada, Ltd.
Champlin Gas Gathering, Inc.
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin International Petroleum Company
Champlin Liquid Pipeline, Inc.
Champlin Marketing, Inc.
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Pipeline, Inc.
Champlin Refining, Inc.
Champlin Trading Company

Chicago & Western Indiana Railroad Company
Chicago Heights Terminal Transfer Railroad Company
Delta Finance Company, Ltd.
Denver Union Terminal Railway
Des Chutes Railroad Company
Doniphan, Kensett & Searcy Railroad
Elk Mountain Coal Company
Esperanza Pipeline Company
Galveston, Houston and Henderson Railway Company
Great Southwest Railroad, Inc.
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
MKT Exploration Company
MP Equipment Corporation
MP Redevelopment Corporation
Missouri Improvement Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Corporation
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Truck Lines, Inc.
Mount Hood Railway Company
Nueces Pipeline, Inc.
Oakland Terminal Railway
Ogden Union Railway & Depot Company
Oregon Short Line Railroad Company
Oregon-Washington Railroad & Navigation Company
Overthrust Pipe Line, Inc.

Pacific Subsidiary, Inc.
Pacific Rail System, Inc.
Panola Pipe line, Inc.
Park Spring, Inc.
Penn Central Corporation
Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Puebleo Union Depot and Railroad Company
Quality Aggregate Company
RM Leasing Company
Rock Springs Royalty Company
Rocky Mountain Energy Company
Sacramento Northern Railway
Southern Illinois and Missouri Bridge Company
Spokane International Railroad Company
St. Joseph & Grant Island Railway Company
St. Joseph Terminal Railroad Company
Standard Realty and Development Company
Stauffer Chemical Company of Wyoming
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas & Missouri Pacific Railroad Company
Texas City Terminal Railway Company
Tidewater Southern Railway Company
Trailer Train Company
UP Leasing Corporation
UP Sub, Inc.
Union Pacific Finance N.V.
Union Pacific Foundation
Union Pacific Freight Services Company
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Motor Freight Company
Union Pacific Railroad Company

Union Pacific Resources Corporation
Union Pacific Resources, Ltd.
Unita Development Company
Upland Industries Corporation
Upland Industrial Development Company
Wamsutter Pipeline, Inc.
Wasatch Insurance Limited
Weatherford Mineral Wells and Northwestern Railway Company
Western Pacific Railroad Company
Winton Coal Company
WPX Freight System, Inc.
Yakima Valley Transportation Company

Respondent Jimmy Paul Besse is a citizen and resident of the State of Kansas.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioner Missouri Pacific Railroad Company respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Missouri rendered in this action on December 16, 1986.

OPINION BELOW

The opinion of the Supreme Court of Missouri is reported at 721 S.W. 2d 740. It appears in the Appendix at page 1a. The opinion of the Missouri Court of Appeals, Eastern District, transferring the action to the Supreme Court of Missouri was not reported. It appears in the Appendix at page A-13. The judgment of the Circuit Court of the City of St. Louis, Missouri appears in the Appendix at page A-21.

JURISDICTION

The judgment and opinion of the Supreme Court of Missouri was rendered on December 16, 1986. No motion for rehearing was filed. This petition for a writ of certiorari was filed within 90 days of the decision below. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

This case arises under the Federal Employer Liability Act ("FELA"), 45 U.S.C. §51, *et. seq.* which provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories *** shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce *** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

The propriety of jury instructions concerning the measure of damages in FELA actions is a matter of federal common law. *Norfolk & Western R. R. Co. v. Liepelt,* 444 U.S. 490 (1980).

STATEMENT OF THE CASE

Jimmy Paul Besse was employed by Missouri Pacific as a carman in Wichita, Kansas. As a carman, Besse's duties included repairing air brakes, changing draft gears, rebuilding railroad cars and changing the wheels on railroad cars. While changing the wheels on a railroad tank car in the Wichita yard on February 24, 1977, Besse allegedly injured his back.

Besse received treatment for his back until April 11, 1977. On March 14, 1977, Besse returned to work until he was furloughed in August, 1977. He worked on a farm until he returned to work at the Wichita Car Shop in March, 1979. Besse worked

the "Wichita wheel truck" for the next twenty-eight months. This job involved essentially the same work and tools as used in the car shop, except that he was required to drive the truck to locations within a 200-mile radius of Wichita to make inspections and repairs away from the yard. Besse continued to work the Wichita wheel truck until July 17, 1981, except for one month's hospitalization for tests in November, 1980.

In May, 1979 Besse was once again treated for back pain. He continued to receive treatment into 1980. Besse was treated by various doctors in the Wichita area during 1981-82. In September 1981, Besse underwent an operation in Wichita in which a disc extrusion and fusion of L5-S1 of the lumbar spine was performed. A second fusion was performed on April 11, 1983 in Wichita.

This action was filed in the Circuit Court of the City of St. Louis, Missouri on February 13, 1980. The case was tried from October 16 to October 24, 1984. Besse claimed lost wages up to the time of trial in the sum of $100,000. Besse was 39 years old at the time of the trial. Based upon the assumption that he would have worked an additional 26 years and upon his current annual wage and fringe benefits of $37,000 per year, Besse claimed lost wages in the sum of $962,000 (26 x $37,000). There was no evidence of the present value of the alleged lost future earnings. Besse also claimed damages for pain and suffering in the sum of $625,500. The total amount of damages requested in the prayer of Besse's petition was the sum of these three figures, or $1,687,500.

In accordance with the then existing Missouri decisionin cases arising under the Federal Employers' Liability Act ("FELA"), no present value instruction was requested or given. Counsel for the parties were permitted only to argue the question of pre-

sent value to the jury.[1]

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[1] Counsel for Respondent made the following argument on damages:

> MR. FRIEDMAN: You've heard the testimony with respect to the fringe benefits, 1983, 1984 so that to the current time he's incurred over a hundred thousand dollars in loss of wage and fringe benefits and at the present time in 1984 the current level of wage loss is over $37,000 a year, and of course we know that as we go into the future that loss of wage and fringe benefits is going to continue. To age 65 it's almost a million dollars. With the current loss of wages and fringe benefits it's well over a million dollars.
>
> And that doesn't even take into consideration any increase in wages. We know the carmen wages have almost doubled in the last ten years, but not taking into account any increase in wages or any increase in cost of fringe benefits, just at the current level, so that the present value is extremely high because not taking into consideration any future increases at the present time the figures are well over a million dollars, and it's going to be incumbent upon you to decide what is a fair and reasonable sum to compensate Jimmy for the injuries and the damages that he sustained, and I've given this a great deal of thought and a great deal of consideration. I've computed what I feel is a fair and reasonable sum which I feel will reasonably and justly compensate Jimmy for the injury and damages he sustained and that is the sum of $1,687,500 and I'll tell you why I have selected that figure. That is because in determining the award in this case it's incumbent upon you not only to compensate Jimmy Besse for the last seven years of his life, for the pain, for the suffering, for anxiety, for the depression not only for the past seven years of his life but here's a 39-year old man who with the Lord's blessing will live another 40 or 50 years or more and it's incumbent upon you to compensate him not only for past seven years but on into the future for the next 30, 40 or 50 years. (Trial Transcript, Vol. III, pp. 494-495).

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Counsel for Petitioner made the following argument on damages:

> MR. TUCKER: If you're looking at the newspaper you know what you can get when you invest money these days. You can

The jury returned a verdict for the Respondent in the exact sum requested—$1,687,500—after deliberating 25 minutes. The Circuit Court entered a judgment on the jury verdict as of October 24, 1984. Petitioner filed a timely motion for new trial on November 7, 1984. On December 21, 1984, the Circuit Court overruled the motion for new trial. Petitioner filed a timely Notice of Appeal to the Missouri Court of Appeals, Eastern District on December 28, 1984.

On March 4, 1985, this Court rendered its decision in *St. Louis-Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985) *rev'g, Dickerson v. St. Louis Southwestern Ry. Co.,* 674 S.W.2d 165 (Mo. App. 1984), in which it overruled a series of recent decisions by the Supreme Court of Missouri and the Missouri Court of Appeals, Eastern District which had held that, under the system of jury instructions in Missouri, no pre-

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look in the paper and you—a Treasury Bond, long-term bond, you can get 12 percent or even a little—

[Objection overruled].

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If you took 10 percent of some savings you had and put in $50,000, you could get 5 percent a year, that works all the way up to the figure $200,000. At 10 percent, take it down to the bank, you could get $20,000 a year over long-term investment. Means after the entire time you'd still have the $50,000, the seventy-five or the hundred, $150,000, you'd still have that over the entire period of time but each year you're paid five, five thousand dollars, seventy-five hundred, ten, fifteen thousand, twenty thousand. Same goes for 12 percent, what you can earn with investing in 12 percent. If you invest $50,000 at 12 percent a year you get $6,000 a year. If you invest $100,000 at 12 percent you get $12,000. If you go up to $200,000 invested at 12 percent you get $24,000 a year. You all know that. At the end of the term of the certificate or the bond or whatever else you still have all your principal intact, you will have the $50,000 or $100,000 or $200,000. You still have that there.

Take $200,000 at 12 percent, you can get $24,000 a year at 12 percent or even 10 percent at 200,000, you get 20 percent a year, but after 5, 10, 15, 20 years you still have that $100,000 or in some cases $200,000. (Trial Transcript, Vol. III, pp. 548-549, 550).

sent value instruction could be given.[2] This Court held that the propriety of damage instructions in an FELA case was a matter of federal substantive law, not state procedural law. The Court further held that "an utter failure to instruct to the jury that present value is the proper measure of a damage award is error [and the prior Missouri instruction practice] is thus at odds with federal law." 470 U.S. at 412.

Petitioner raised the issue of the failure to give a present value instruction in its first brief in the Missouri Court of Appeals, Eastern District filed on October 23, 1985. The Missouri Court of Appeals rendered its decision on April 22, 1986. The Court of Appeals held that the record provided "conclusive [evidence] that the jury did not consider or apply present value concepts to the lost wages claim." App. at A-19. However, it transferred the appeal to the Supreme Court of Missouri because *Dickerson* was inconsistent with prior Missouri decisions and it held that the Missouri Supreme Court should rule upon whether *Dickerson* should be applied retroactively in these circumstances. App. at A-20.

Petitioner again raised the issue of the application of *Dickerson* in the Supreme Court of Missouri. The Supreme Court of Missouri affirmed the judgment of the Circuit Court. The court below did not rule directly on the retroactivity issue. Instead, it held that Petitioner waived its right to complain of the failure to give a present value instruction under state procedural law by its failure to request such an instruction, despite the fact that under state procedural law in effect at the time of trial Petitioner was not entitled to any such instruction. App. at A-8.

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[2] *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507 (Mo. banc) *cert. den. sub. nom., Burlington Northern Inc. v. Bair,* 464 U.S. 830 (1983); *Dunn v. St. Louis-San Francisco Ry. Co.*, 621 S.W.2d 245 (Mo. banc 1981), *cert. den. sub. nom., Burlington Northern R.R. Co. v. Dunn,* 454 U.S. 1145 (1982); *Brotherton v. Burlington Northern R.R. Co.*, 672 S.W.2d 133 (Mo. App. 1984); *Fisher v. Burlington Northern R.R. Co.*, 640 S.W.2d 174 (Mo. App. 1982); and *Marshell v. Burlington Northern R.R. Co.*, 637 S.W.2d 168 (Mo. App. 1982).

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the clear mandate of this Court in *St. Louis Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985 that the "Missouri courts' refusal to allow instruction of FELA juries on present value is . . . at odds with federal law" and "an utter failure to instruct the jury that present value is the proper measure of a damage award is error." *Id.* at 412. Petitioner respectfully requests the Court to issue a writ of certiorari to insure that the substantive federal law is followed in the State of Missouri and to insure uniform application of the FELA.

A.

Dickerson Should Be Applied Retroactively to Govern All Cases Pending on Direct Appeal At The Time It Was Rendered

The refusal of the court below to enforce Petitioner's right to a present value jury instruction conflicts not only with this Court's opinion in *Dickerson* holding that the utter failure to give such an instruction is error under federal substantive law, but also conflicts with this Court's decisions that "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority of Durham,* 393 U.S. 268, 281 (1969). Petitioner respectfully urges the Court to issue its writ of certiorari to insure that Missouri courts correctly apply the federal substantive law under the FELA by reviewing this decision of the Supreme Court of Missouri in conflict with this Court's prior decisions.[3] *Cf. Hankerson v. North Carolina,* 432 U.S. 233, 240 (1977) (certiorari granted on issue whether state court correctly declined to give retroactive effect to prior Supreme Court decision) and *Pittsburgh v. Alco Parking Corp.,* 417 U.S. 369, 371-372 (1974) (certiorari granted to review con-

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[3] The Missouri Court of Appeals, Eastern District recently held that *Dickerson* should not be applied retroactively. *Welsh v. Burlington Northern R. R. Co.,* 719 S.W.2d 793, 797-798 (Mo. App. 1986).

flict between decision of highest state court and Supreme Court on issue of federal law).

Where a decision is founded upon the federal substantive law, the question of whether it is to be applied retroactively to cases pending on direct appeal "is necessarily governed by federal law." *Thorpe v. Housing Authority of Durham, supra* at 281-282 (1969). The Court, well over a century and a half ago, speaking through Chief Justice Marshall stated the general federal rule in *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801):

> It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied.

There is no reason to except *Dickerson* from the general rule. The Court has long held that present value is the proper measure of damages for lost future wages in FELA cases. *Chesapeake & Ohio R. R. Co. v. Kelly,* 241 U.S. 485 (1916). The giving of damage instructions is a question of federal substantive law. *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490 (1980). Finally, there will be no inequity in applying *Dickerson* retroactively because, as this Court recognized, the exception "does not reach a private civil suit where the change does not extinguish a cause of action but merely requires a retrial on damages before a proper instructed jury." *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 486 n. 16 (1981). Indeed, "considerations of fairness support retroactive application" of the rule requiring a proper damage instruction because the "failure to give the instruction may lead to the plaintiff recovering a windfall award." *Id.,* citing *Norfolk & Western R. R. Co. v.*

Liepelt, supra at 497-498.[4]

Respondent will not be prejudiced by a new trial on damages. His lost wages will be fully recoverable to the time of judgment and his lost future wages will be decided by the jury under proper instructions to reflect his actual pecuniary loss. Therefore, the retroactive application of *Dickerson* comports with the history and purpose of damage awards in FELA cases. Its application will achieve a just and equitable result as the court intended in *Dickerson*. A writ of certiorari should issue to resolve the conflict between decisions of the Missouri courts and this Court.

B.

The Court Should Extend By Analogy the "Cause and Prejudice" Exception to Procedural Defaults in State Courts in Cases Involving Substantive Federal Rights

The court below declined to apply *Dickerson* to the case even though *Dickerson* was rendered while the case was pending on direct appeal. The court rested its decision upon what it characterized as a state procedural ground that Petitioner did not request the giving of a present value instruction in the trial court. App. at A-8. Of course, if Petitioner had been entitled to have a present value instruction under state procedural

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[4] The likelihood of a windfall is substantial in this case. First, the plaintiff's calculations of future wage loss were based upon payment of the full amount of his wages and benefits rather than the after-tax net wages. *Cf. Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 537 (1983). Second, this figure of $962,000 was not reduced to present value. The potential windfall ranges from $486,000 (using a 6% discount factor) to $668,000 (using a 12% factor). *See* Am. Jur. 2d *Desk Book,* Item No. 128, pp. 415, 439 (present value tables). The court below assumed the jury considered future inflation and that it offset any reduction to present value. App. at A-8. *Cf. Jones & Laughlin Steel Corp. v. Pfeifer, supra* at 544-551 ("total offset" theory of damages resting on assumption that present value calculation offset by inflation rejected under federal law).

law, its failure to make such a request would be a waiver. But in this case Petitioner was not entitled to such an instruction under decisions of the Supreme Court of Missouri. It was the erroneous interpretation of the FELA by the court below in prior decisions which induced the very inaction which the court described as a waiver. Such an inequitable result should not be allowed to stand.

This Court has not permitted the States courts evade the enforcement of substantive federal rights by attempting to cloak their decisions in asserted grounds of State procedure. This has been particularly true in FELA cases. For example, in *Brown v. Western Ry.*, 338 U.S. 294 (1949) the Court held that federal rights are "not to be defeated under the name of local practice" by application of strict state pleading rules. *Dickerson* itself affirmed this principle. 470 U.S. at 411.

A failure to raise a jury instruction issue in the trial court is not invariably a bar to its consideration on appeal. In federal habeas corpus cases, the Court has applied a "cause and prejudice" standard to claims of error in which a defendant commits a procedural default in state court.

For example, in *Reed v. Ross,* 468 U.S. 1 (1984), a defendant was convicted of murder in a North Carolina state court in 1969. The defendant claimed lack of malice and self-defense. The trial court instructed the jury that defendant had the burden of proof on these defenses. Defendant did not raise this issue on direct appeal. In subsequent decisions, this Court struck down as violation of due process the requirement that defendant bear the burden of proof on these issues and held that the rule should be applied retroactively. *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Hankerson v. North Carolina,* 432 U.S. 233 (1977).

Defendant challenged the jury instructions for the first time in a 1977 federal habeas corpus proceeding. The question in *Reed* was whether the defendant had shown the requisite "cause

and prejudice" under the standard of *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court noted that underlying the concept of "cause" is the notion that a defendant is bound by his tactical choices at trial, and that he cannot flout state procedures at trial and then raise the claim later. 468 U.S. at 13. With respect to *Reed*, the Court held that "cause" for failure to raise a claim may occur where a new decision disapproves a practice sanctioned in prior cases. *Id.* at 17. Whether there existed a reasonable basis for pressing a claim in this situation depends upon how direct the court's sanction of the prior practice had been, how well entrenched the practice was in the relevant jurisdiction and how strong the available support was for the opposing view. *Id.* at 17-18.

The same standard should be applied to a question of waiver of a federal substantive right in civil cases tried in state courts as a result of a default under state procedural rules because the same considerations govern both issues. Therefore, the "cause and prejudice" test should be extended to civil cases. This is particularly true where the issue only becomes apparent because of an appellate decision while the case is pending for review. *Cf. Great Northern Ry. Co. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

Petitioner meets this standard for excusing its failure to tender a present value instruction in the trial court. Prior to the institution of the pattern jury instruction system of the Missouri Approved Instructions ("MAI"), Missouri courts had permitted the trial courts in FELA to instruct juries on present value. *See, e.g., Burtch v. Wabash Ry. Co.*, 236 S.W. 338 (Mo. banc 1921). However, after MAI, the Missouri Supreme Court disapproved the practice. *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507 (Mo. banc) *cert. den. sub. nom. Burlington Northern Inc. v. Bair*, 464 U.S. 830 (1983); *Dunn v. St. Louis - San Francisco Ry. Co.*, 621 S.W.2d 245 (Mo. banc 1981) *cert. den. sub. nom. Burlington Northern Inc. v. Bair*, 464 U.S. 830 (1983); *Dickerson v. St. Louis - Southwestern Ry. Co.*, 674

S.W.2d 165 (Mo. App. 1984) [*rev'd*, 470 U.S. 409 (1985), *after remand*, 697 S.W.2d 210 (Mo. App. 1985)]; *Brotherton v. Burlington Northern R. R. Co.*, 672 S.W.2d 133 (Mo. App. 1984); *Fisher v. Burlington Northern R. R. Co.*, 640 S.W.2d 174 (Mo. App. 1982); *Marshell v. Burlington Northern R. R. Co.*, 637 S.W.2d 168 (Mo. App. 1982).

Dickerson was initially decided by the Missouri Court of Appeals on June 6, 1984. Defendant's application to transfer the case to the Supreme Court of Missouri was denied on September 11, 1984. Petitioner's case was tried from October 16-24, 1984. The instruction conference was held on October 24, 1984. The verdict was returned and the judgment entered as of that date. Pursuant to the Missouri Rules of Civil Procedure, Petitioner filed its post-trial motions on November 7, 1984.[5] The *Dickerson* petition for a writ of certiorari was filed on December 6, 1984. 53 U.S.L.W. 3485. On December 21, 1984, the trial court overruled Defendant's post-trial motions. Defendants' notice of appeal was filed on December 28, 1984. In a decision that the court below admitted came as a surprise to most Missouri lawyers, App. at A-7, this Court granted certiorari in *Dickerson* and summarily reversed in a *per curiam* decision on March 6, 1985. Petitioner raised the present value instruction issue at the first opportunity in its brief filed in the appellate courts.

Thus, at the time of trial it was firmly established in Missouri instruction practice under MAI that a present value instruction could not be given in an FELA case. The highest court in the State and the intermediate court of general appellate jurisdiction over the Circuit Court of the City of St. Louis had spoken on the issue recently and authoritatively. This Court had declined to review two of the decisions. While the denial of the peti-

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[5] Although Petitioner's post-trial motions did not raise the jury instruction issue, it did assert as error that "the verdict clearly indicates a misunderstanding upon the part of the jury as to the measure and elements of damages property warranted by the evidence." Petitioner's Motion for New Trial, ¶12.

tions for writ of certiorari in *Dunn* and *Bair* "imports no expression of opinion upon the merits of the case," *United States v. Carver*, 260 U.S. 482, 490 (1923), it is obviously a relevant circumstance in considering counsel's failure to raise the issue at trial. As it appeared on October 24, 1984, Missouri appellate courts were not going to allow the giving of a present value instruction. This Court had already turned down two opportunities to consider the issue. No petition for a writ of certiorari had yet been filed in *Dickerson* (and would not be until after the post-trial motion was filed in this case).[6] There was no reason to believe that the petitioner in *Dickerson* was going to meet any more success than the petitioners in *Dunn* and *Bair*.

In these circumstances, there is little question that the failure to tender a present value instruction was not a conscious tactical choice, but rather the result of complying with recent and explicit Missouri decisional law on the very point in question. It was improper for the court below to rely upon the procedural default of trial counsel, who lacked the benefit of both clairvoyance and hindsight. It is especially inequitable where the procedural default was induced by the court's own repeated misapplications of federal substantive law. To find a waiver of the *Dickerson* issue in this case would endorse a rule requiring either "extraordinary vision" or the quixotic practice of raising numerous apparently groundless issues (even in the face of explicit, recent authority to the contrary) "in the hope that some aspect might mask" a substantive right which may ultimately be uncovered by a "surprising" subsequent decision. *Engle v. Isaac*, 456 U.S. 107, 131 (1982).

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[6] Petitioner could not have amended its post-trial motions to include the present value instruction issue after the *Dickerson* petition was filed or decided because, under Missouri procedural rules, any amendments to post-trial motions filed more than fifteen days after the verdict are a nullity and preserve nothing for review. *Lloyd v. Garren*, 366 S.W.2d 341 (Mo. 1963).

C.

The "Clear Break" Exception to Retroactivity Of Decisions in Civil Cases Should Be Reexamined

The Court recognized an exception to the general rule of the *Schooner Peggy* case in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). In *Chevron,* the Court set forth a three-part test to determine whether the exception should apply in civil cases:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."
>
> * * *
>
> Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-107 (citations omitted).

The first element of the *Chevron Oil* test is a threshold requirement for the application of the remaining two elements. Only after it has been determined that the new rule establishes a "clear break" from prior law, does the Court go "on to examine the history, purpose, and effect of the new rule, as well as the inequity that would be imposed by its retroactive application." *United States v. Johnson,* 457 U.S. 537, 550 n. 12 (1982). Until recently, the Court applied the "clear break" ex-

ception in both civil and criminal cases. However, in *Griffith v. Kentucky,* ____ U.S. ____, 55 U.S.L.W. 4089 (1987), the Court held that new constitutional rules must be applied retroactively to all criminal cases pending upon direct review regardless of whether it constitutes a "clear break" with prior decisions.

The Court noted in *Chevron* that "the nonretroactive application of judicial decisions has been most conspicuously considered in the area of the criminal process [citations omitted]. But the problem is by no means limited to that area." *Id.* at 106-107. It also applies to civil cases involving nonconstitutional questions. *Id.* at 107.

Generally, there is "no distinction . . . drawn between civil and criminal litigation" in determining whether a new rule should be applied retroactively. *Linkletter v. Walker,* 381 U.S. 618, 627 (1965). The Court's opinions regarding the retroactivity of decisions in civil cases have drawn heavily by analogy on principles applied in the criminal area. *See, e.g., Chevron Oil Co. v. Huson, supra* at 106-107. There is no principled distinction to be made between criminal and civil cases in applying a "clear break" exception to the general rule of retroactivity of decisions on pending appeals. To the extent that reliance of the parties on prior decisions is a consideration, it is subsumed in the remaining two factors in *Chevron. Cf. Griffith v. Kentucky, supra,* 55 U.S.L.W. at 4092. As in *Griffith,* similarly situated civil parties are not treated the same by application of a "clear break" exception. The defendant in *Dickerson* received the benefit of the new rule in Missouri while Petitioner would not under the current civil standard. *Id.; Dickerson, after remand,* 697 S.W.2d 210 (Mo. App. 1985).

This case does not fit neatly into the *Chevron Oil* categories. *Cf. United States v. Johnson, supra* at 551. *Dickerson* did not represent a "clear break" from prior decisions of this Court, or from federal appeals courts or other state courts. *See, e.g., Chesapeake & Ohio R. R. Co. v. Kelly,* 241 U.S. 485 (1916);

Beanland v. Chicago, R. I. & P. R. R. Co., 480 F.2d 109, 115 (8th Cir. 1973); *Gannaway v. Missouri-Kansas-Texas R. R. Co.*, 575 P.2d 566 (Kan. App. 1978). It does, however, represent a "clear break" from the practice first approved in Missouri in 1981 and reaffirmed on five occasions thereafter prior to the trial of this case. Thus, to the extent a decision on retroactivity must focus on "how well entrenched the practice was in the relevant jurisdiction at the time of defense counsel's failure to challenge it," *Reed v. Ross, supra* at 17, the clear break exception stated in the first point under the *Chevron* standard would appear to apply unless the Court abrogates it.

The Court should grant certiorari to reconsider the rule in *Chevron* as to whether the "clear break" exception should also be abolished in civil cases.

CONCLUSION

For the foregoing reasons, Petitioner Missouri Pacific Railroad Company respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri.

Respectfully submitted,

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Dated: February, 1987

APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 68158

Jimmy Paul Besse,
Plaintiff-Respondent,

vs.

Missouri Pacific Railroad Company,
Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis
The Honorable Michael F. Godfrey, Judge

The plaintiff, a railroad employee working out of Wichita, Kansas, recovered a judgment of $1,687,500.00 under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982), against his employing railroad in the Circuit Court of the City of St. Louis. The defendant appealed, contending (1) that the trial court should have dismissed the suit under the doctrine of *forum non conveniens,* and (2) that it is entitled to a new trial because the trial court did not give a "present value" instruction, as now required by St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985). The Court of Appeals, Eastern District, affirmed, but transferred the case here because of the instruction point. We consider both arguments as on original appeal and likewise affirm, concluding: (1) that the trial court did not abuse its discretion under the special facts of this case in declining to apply the doctrine of *forum non conveniens,* because the suit was filed at the location of the home office of the defendant and the forum is not shown to be manifestly inconvenient, and (2) that the defendant was not entitled to a present-value instruction because none was requested.

I.

The doctrine of *forum non conveniens* exists in Missouri and may be applied in FELA cases such as this one. State ex rel. Chicago, Rock Island & Pacific Railroad Co. v. Riederer, 454 S.W.2d 36 (Mo. banc 1970).

The Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982), was adopted by Congress to give railroad employees and other employees under its coverage a right of action against their employer for negligence. Suit may be brought in any federal court of the district in which the defendant does business, or in any state court where state venue statutes permit. 45 U.S.C. § 56 (1982). A suit brought in a state court may not be removed to the federal court in the manner of other civil actions, whatever the citizenship of the parties might be. 28 U.S.C. § 1445 (1982). The states are not at liberty to reject the jurisdiction conferred by Congress. Miles v. Illinois Cent. R. Co., 315 U.S. 698, 703 (1942). States, however, may elect to apply a doctrine of *forum non conveniens,* provided that they do not impose burdens on FELA cases which they do not apply to other civil actions. State of Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950).

In *State ex rel. Chicago, R.I. & P.R. Co. v. Riederer, supra,* we issued a writ of mandamus against a trial judge who had taken the position that he could not apply the doctrine to FELA cases. We directed him to consider the defendant's claim of *forum non conveniens,* but did not instruct him as to the result to be reached. We listed six factors for consideration, as follows:

(1) "place of accrual of the cause of action"

(2) "location of witnesses"

(3) "the residence of the parties"

(4) "any nexus with the place of suit"

(5) "the public factor of the convenience to and burden upon the court and"

(6) "the availability to plaintiff of another court with jurisdiction of the cause of action which affords him a forum for his remedy". *Riederer,* 454 S.W.2d at 39.

The present defendant moved for dismissal of this action pointing out that the accident sued on occurred at Wichita, Kansas, 20 miles from the plaintiff's home and 446 miles from the place of trial, that the eyewitness resided there, that the treating physicians were in Wichita, and that the only connections with St. Louis were the presence of the defendant railroad's principal office, and the office of the plaintiff's attorney there. The trial court denied the motion and writ relief was refused. The motion was renewed before the judge to whom the case was assigned for trial, and denied by him. Error was assigned in the motion for new trial.

A discussion of basic principles should be helpful. The plantiff, initially, may select the forum by filing suit in any venue allowed by law. The right of choice of forum, however, is not absolute. A suit is subject to dismissal if it is filed in a forum which is manifestly inconvenient. The court, in ruling upon the issue, may consider the convenience of the parties, as well as its own convenience. The people of Missouri are not obliged to make their courts available for lawsuits in which there is no significant Missouri nexus.

The decision on the question of dismissal for inconvenient forum involves a weighing of the factors set out in *Riederer.* For this reason, the decision is one which is largely committed to the discretion of the trial court. Discretion, however, is not synonymous with whim. The discretion is a controlled discretion. Trial courts are obliged to give attention to the doctrine and to dismiss cases which have no tangible relationship to Missouri.

An instructive case is Elliott v. Johnson, 292 S.W.2d 589 (Mo. 1956). There we held that the trial court properly dismissed a suit brought in Vernon County, Missouri arising out of an automobile accident in Crawford County, Kansas, in which all parties to the suit were residents of Kansas. The opinion said that there was an adequate forum in Kansas, and that suit was brought in Missouri only for tactical reasons. 292 S.W.2d at 593-594. The court considered it of little significance that Missouri and Kansas courts were quite experienced in applying and predicting each other's laws.[1]

Even if the trial court initially overruled a motion to dismiss for inconvenient forum and the appellate court declined to intervene by writ, review after trial is not precluded. Our writs are issued grudgingly, and not to correct discretionary rulings. Inasmuch as interlocutory appellate relief is not available, errors may be asserted on appeal so long as the claim is timely raised in the trial court. A plaintiff takes a risk by proceeding to trial after notice of the defendant's claim of inconvenient forum. *Lowe v. Norfolk & Western Ry. Co.*, 124 Ill. App.3d 80, 463 N.E.2d 792, 798 (1984).

Turning to the facts of this case, there is inevitably some inconvenience when there is a long distance between the place of an accident and the place of trial. Eyewitnesses and treating physicians who are unable or unwilling to travel to the trial must be presented through the much less satisfactory method of deposition. Counsel must travel to take depositions at the place of the accident. Investigation may be more difficult, and witnesses located in investigation may not be compelled to appear at trial. There is substantial expense if witnesses are transported to the trial. Trial judges should consider dismissal

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[1] *Loftus v. Lee*, 308 S.W.2d 654 (Mo. 1958) is not inconsistent. It turns on the observation that Overland Park, Kansas is a residential suburb of Kansas City, Missouri, and holds that Jackson County is not an inconvenient forum for an accident occurring there.

when any suit for personal injuries is brought at a great distance from the place of the accident, unless there is some nexus with the place of trial.

Convenience of counsel is of minimal significance. We are confident that there is no place in the United States where excellent lawyers qualified to try personal injury cases cannot be found. Almost all American jurisdictions, furthermore, admit out-of-state counsel *pro hac vice.*

Nor is residence of expert witnesses an important consideration. It is to be expected that counsel for both sides will look for experts at or near the place of trial, wherever that may be. In a case involving a large claim, important experts will gladly travel wherever they are needed, for sufficient consideration.

Even though a contrary holding might well be sustained in the future, we are unable to conclude that the trial judges who ruled on the issue in this case can be said to have committed abuse of discretion in declining to dismiss. A controlling circumstance is that the defendant railroad company was sued in the city in which its general headquarters was located. This location may be considered its residence, and residence is one of the factors highlighted in *Riederer.* A plaintiff is invariably allowed to sue in the place of his or her residence, even though the facts giving rise to the claim happened far away. *See Koster v. American Lumbermen's Mutual Casualty Co.,* 330 U.S. 518, 524 (1947). It is seldom impermissibly inconvenient to sue a defendant at that defendant's place of residence. The defendant cites *Rozansky Feed Co. Inc. v. Monsanto Co.,* 579 S.W.2d 810 (Mo. App. 1979), in which the dismissal of a suit for *forum non conveniens* was affirmed even though one of the corporate defendants had its principal office in the county in which suit was brought. The case is distinguishable because there was also a nonresident corporate defendant. The court of appeals, furthermore, sustained an exercise of discretion, just as we do here.

Inasmuch as we now have a trial record, it is proper to consider that record in deciding whether the trial court erred in its ruling. *Barrett v. Missouri Pacific R. Co.*, 688 S.W.2d 397 (Mo. App. 1985). The two eyewitnesses testified in person. The defendant produced all but one of its witnesses live. The defendant complains of the lengthy reading of depositions, but these were of the plaintiff's witnesses and treating physicians. Doctors often testify by deposition, even in trials in their home area. We do not discern inconvenience in the trial sufficient to demonstrate abuse of discretion or require reversal.

We have given attention to two relatively recent cases in the Illinois courts which seem well considered and consistent with our view of *forum non conveniens*. *Wieser v. Missouri Pacific R. Co.*, 98 Ill.2d 359, 456 N.E.2d 98 (1983), seems distinguishable from this case only in that the suit was not brought in the jurisdiction in which the railroad had its head office or principal place of business. The court held on interlocutory appeal that the trial court should have dismissed the suit for *forum non conveniens*.[2] *Lowe v. Norfolk & Western Ry. Co.*, 124 Ill.App.3d 80, 463 N.E.2d 792 (1984) stressed the element of protection of the local courts in reversing with directions to dismiss, after trial, a multiplicity of suits filed in Madison County, Illinois, but arising out of the leakage of contaminated material following a train wreck in central Missouri.

We have written at some length in order to indicate that the doctrine of *forum non conveniens* is viable in Missouri as a matter of judicial policy, that the trial courts have a duty to apply it in appropriate cases, that the discretion of the trial court is

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[2] We would now question the holding in *Ingle v. Illinois Central Gulf R. Corp.*, 608 S.W.2d 76 (Mo. App. 1980), *cert. denied* 450 U.S. 916 (1981).

broad but not unlimited, and that abuse of discretion may be corrected on appeal.[3]

II.

A "present value" instruction, telling the jury in essence that a dollar paid today is worth more than a dollar to be paid in the future, has not been specifically authorized in Missouri, either in FELA cases or in other personal injury cases. *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507 (Mo. banc 1983), *cert. denied Burlington Northern, Inc. v. Bair*, 464 U.S. 830 (1983), is the latest of several of our decisions holding that there was no obligation to give such an instruction, in a FELA case, even if request is made. The Supreme Court of the United States denied certiorari in that case, as it had in other cases involving the same request.

Then, to the surprise of most Missouri lawyers, that Court accepted review of a case in which a present value instruction was requested and denied, *Dickerson v. St. Louis Southwestern Ry. Co.*, 674 S.W.2d 165 (Mo. App. 1984), and held that the giving of such an instruction was mandated by federal law when requested. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985).

The defendant did not request a present value instruction in this case. It now argues that there has been a change in the substantive law governing the case and that it should have the benefit of that change.

We do not agree. In *Bair*, we made it clear that the claim of present value may be the subject of evidence and may be argued to the jury, as a matter of plain fact. The defendant had such a

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[3] A court which dismisses a case for *forum non conveniens* should frame its order so as to protect the plaintiff against any attempts to invoke the statute of limitations. *See Wieser v. Missouri Pacific R. Co.*, 98 Ill.2d 359, 456 N.E.2d 98 (1983).

right in this case. It did not put on any expert testimony, but did argue extensively on present value. The principle exists, quite apart from the instruction.

Under our procedural law, the trial court need not give an instruction unless a correct instruction is prepared and requested by counsel. Federal causes are tried in state courts under state procedural rules. The Supreme Court of the United States has the ultimate right to specify the matters about which FELA juries must be instructed, but the parties must make appropriate requests.

The defendant argues that the failure so to instruct amounts to "plain error." We do not agree. The case was properly tried under the procedural rules then in effect. We sympathize with a defendant who does not make a request which would appear to be futile. But there is also a substantial interest in preserving a verdict in a case which was otherwise free from error, and in which the trial judge had absolutely no means of anticipating the requirement which our reviewing court now recognizes. We hold that the failure of a request concludes the defendant.

The defendant argues that the jury was necessarily influenced by the absence of the present value instruction because its verdict awarded the plaintiff the entire amount sought in closing argument, and that plaintiff's counsel asked for $26,000 per year for 37 years without reduction to present value. We cannot exclude the possibility that the jury considered the likelihood of future inflation, or the possibility of promotion. The trial judge allowed the verdict to stand and excessiveness is not argued before us. We are unable to say that the verdict is tainted.

The judgment is affirmed.

CHARLES B. BLACKMAR, Judge

Robertson and Rendlen, JJ., concur; Billings, J., concurs in result in separate opinion filed; Higgins, C.J. and Pritchard, Sp.J., concur in result and in separate concurring in result opinion of Billings, J.; Welliver, J., dissents in separate opinion filed. Donnelly, J., not sitting.

SUPREME COURT OF MISSOURI
EN BANC

No. 68158

Jimmy Paul Besse,
Plaintiff-Respondent,

vs.

Missouri Pacific Railroad Company,
Defendant-Appellant.

OPINION CONCURRING IN RESULT

The principal opinion recognizes and acknowledges that this suit was brought "at the location of the home office of the defendant." This fact, standing alone, forecloses any issue of *forum non conveniens.*

Because I fear some of the language found in the principal opinion would restrict the current policy of vesting discretion in the circuit courts, I cannot subscribe to such a change of policy. So long as plaintiff's selection of the forum complies with the statutes and rules governing venue, the defendant should not be permitted to select the site of suit by an expanded judicial doctrine called *forum non conveniens.* Consequently, I concur only in result.

WILLIAM H. BILLINGS, Judge

SUPREME COURT OF MISSOURI
EN BANC

No. 68158

Jimmy Paul Besse,
Respondent,

v.

Missouri Pacific Railroad Company,
Appellant.

DISSENTING OPINION

I respectfully dissent. If there is such a thing as a factual situation which would justify the application of the doctrine of forum non conveniens, this would have to be the case.

I cannot join in what I perceive to be the eternal hope held out by the principal opinion to defendants. I would either follow our brothers from Illinois[1] and apply the doctrine of forum non conveniens and stop the building of our "Madison County, Illinois," or I would frankly admit that *Elliott v. Johnson,* 292 S.W.2d 589 (Mo. 1956) is an aberration among our Missouri cases, which otherwise never have applied the doctrine of forum non conveniens to any set of facts, and would overrule it.

Neither the extensive treatise, nor the purported analysis and test, make the result reached by the majority any more palpable to the defendant. The fact remains that in all of the F.E.L.A. cases reported and in the dozens of cases denied by us on application for original writs, which are not reported, this Court has never applied the doctrine of forum non conveniens to a

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[1] *Wieser v. Missouri Pacific R. Co.,* 98 Ill.2d 359, 456 N.E.2d 93 (1983).

F.E.L.A. case.[2] Our rulings have not been restricted to the single railroad which happens to have its home office in St. Louis. The city of St. Louis has been and continues to be our "Madison County, Illinois."

WARREN D. WELLIVER, Judge

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[2] *See, e.g., State ex rel. Chicago, Rock Island & Pacific R. Co. v. Riederer,* 454 S.W.2d 36 (Mo. banc 1970); *Hayman v. Southern Pacific Co.,* 278 S.W.2d 749 (Mo. 1955); *State ex rel. Southern R. Co. v. Mayfield,* 240 S.W.2d 106 (Mo. banc 1951), *overruled State ex rel. Chicago, Rock Island & Pacific R. Co. v. Riederer,* 454 S.W.2d 36 (Mo. banc 1970); *Ingle v. Illinois Central Gulf R. Co.,* 608 S.W.2d 76 (Mo. App. 1980), *cert. denied,* 450 U.S. 916 (1981); *cf. Loftus v. Lee,* 308 S.W.2d 654 (Mo. 1958).

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION THREE

No. 49567

Jimmy Paul Besse,
Plaintiff-Respondent,

vs.

Missouri Pacific Railroad Company,
Defendant-Appellant.

Appeal from the Circuit Court
of the City of St. Louis

Hon. Michael F. Godfrey, Judge

OPINION FILED:
April 22, 1986

Plaintiff, Jimmy Paul Besse, brought suit against his employer, Missouri-Pacific Railroad, under the Federal Employers' Liability Act 45 U.S.C. § 51 *et seq.* for personal injuries and lost wages arising out of a work related accident. The jury returned a verdict in favor of plaintiff for the full amount of the prayer.

Defendant, railroad, appeals claiming the trial court erred in overruling railroad's motion to dismiss for forum non conveniens and in failing to instruct the jury to reduce an award for lost future earnings to present value.

Plaintiff was employed by the railroad as a carman in Wichita, Kansas for approximately eight and one-half years

prior to his injury. On February 24, 1977, plaintiff injured his back while changing wheels on a railroad tank car. He was depressing and pinning ride control springs with a tool known as a "butterfly bar" or "hockey stick." He was thirty-two years old at the time of injury.

From the day of the injury until trial plaintiff was treated by five doctors for lower back strain and a herniated disc. He was hospitalized five times and underwent back surgery twice. Plaintiff has suffered continuous pain since the injury, and missed numerous days from work until July 1981 when he was forced to terminate his employment with the railroad.

Plaintiff is a resident of Newton, Kansas, which is approximately twenty miles north of Wichita. He was employed and injured in Wichita. All treating physicians and hospitals are located in the Wichita area. The eyewitness to the injury was living in Fort Worth, Texas at the time of trial. Defendant, railroad, was headquartered in St. Louis, Missouri at the time of trial, however, they have facilities in Kansas and were amenable to service of process in that state.

Defendant, railroad, claims the proper forum for the lawsuit is Wichita, Kansas and the court erred in overruling defendant's motion to dismiss on grounds of forum non conveniens.

It is first noted and the parties do not dispute that venue is proper in St. Louis under both Missouri law, § 508.040 RSMo 1978, and federal law, 45 U.S.C. § 56. The doctrine of forum non conveniens cannot be applied by the trial court unless the court in which the action is filed has jurisdiction of the subject matter and venue is proper. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504 (1947).

Our courts have said that the doctrine of forum non conveniens is to be applied with caution and only upon a showing of inconvenience and when the ends of justice require it. *Loftus v. Lee,* 308 S.W.2d 654, 661 (Mo. 1958). Unless the balance of the

equities is strongly in favor of not forcing defendant to trial in Missouri, plaintiff's choice of Missouri as the forum for this litigation should not be disturbed. *Ingle v. Illinois Central Gulf R.R. Co.*, 608 S.W.2d 76, 79 (Mo.App. 1980), *cert. denied,* 450 U.S. 916 (1981).

We review this issue for abuse of discretion which occurs only if the ruling is against the logic of the circumstances and if reasonable men could not differ as to the decision. *Carwell v. Copeland,* 631 S.W.2d 669, 670-71 (Mo.App. 1982).

The factors to be weighed in making a determination whether to invoke the doctrine of forum non conveniens include the "place of accrual of the cause of action, location of the witnesses, the residence of the parties, any nexus with the place of suit, the public factor of the convenience to and burden upon the court, and the availability to plaintiff of another court with jurisdiction of the cause of action which affords him a forum for his remedy." *State ex rel. R.I. & P.R. v. Reiderer,* 454 S.W.2d 36, 39 (Mo. banc 1970).

At trial, plaintiff offered testimony of fourteen witnesses. Five of the eight depositions read by plaintiff at trial were plaintiff's treating physicians, the other three depositions read at trial were of plaintiff's co-workers at the time of injury. Live testimony was elicited from four expert witnesses who lived in St. Louis and a witness who was present at the time of injury and who lived in Fort Worth, Texas at the time of trial.

Railroad offered testimony of six witnesses. Only one deposition was read by railroad of a chiropractor who lived in Cassville, Missouri. Three of plaintiff's supervisors at the time of injury testified live on behalf of railroad. A non-medical expert testified, who lived in Chicago Heights, Illinois, and a medical expert from St. Louis testified for railroad.

The cause of action occurred in Wichita, Kansas, but the nature of the basic facts on causation and injury was not such

that a view of the place of the injury would be necessary or beneficial even in the unlikely and unusual event of a request for a viewing. The treating physicians were all located in the Wichita area. Plaintiff with defendant's counsel present took depositions of these witnesses who were subject to cross-examination. Plaintiff's co-workers testified by deposition again with defendant's counsel present and subject to cross-examination. Defendant offered a medical expert located in St. Louis. All other non-medical expert witnesses testified live. Four of those experts lived in St. Louis. Defendant's experts resided in Chicago Heights, Illinois and St. Louis. The only deposition defendant offered was from a chiropractor who lived in Missouri and so subject to compulsory process. It does not appear from the record that defendant was prejudiced by the location of the witness.

Defendant's home office was in St. Louis and had the ability of obtaining willing witnesses who were present at the time of the injury. We do not discern an impermissible burden upon the defendant and the court where the forum was the home office of defendant. We distinguish this case from those cases where plaintiff selects a venue in what is perceived to be one favorable to plaintiffs in terms of predicting higher verdict awards, but where defendant is not sued in the venue of its own home office.

The plaintiff may not by choice of an inconvenient forum "vex," "harass," or "oppress" the defendant by inflicting upon him expenses or trouble not necessary to his right to pursue his own remedy. *Gulf Oil Corp. v. Gilbert,* 330 U.S. at 508. Another consideration which may be primary and overriding is a finding that plaintiff's chosen forum is so unrelated to the cause of action, plaintiff's residence, and defendant's office or residence as to constitute "fraudulent procurement" i.e. harassment. Such finding is not a prerequisite to application of the doctrine but would justify dismisal. *Id.* Absent a finding of "fraudulent procurement" the court should honor the

plaintiff's choice of forum if a reasonable court could differ with the decision to dismiss. *Barrett v. Missouri Pacific Railroad Co.*, 688 S.W.2d 397, 399-400 (Mo.App. 1985).

Upon a review of the record, we are unable to find an abuse of discretion here, particularly, when the forum is the location of defendant's corporate home office, the facts of the occurrence were undisputed and the occurrence of the injury was conceded. *Higley v. Missouri Pacific R. Co.*, 685 S.W.2d 572 (Mo.App. 1985). Considering the factors as enumerated by our Supreme Court in *Riederer*, 454 S.W.2d at 39, and the facts enumerated above, this court cannot find an imbalance of equities or that the trial court's action was arbitrary and unreasonable. We would affirm the denial of dismissal for inconvenient forum.

Defendant, railroad's second point claims error by the trial court in failing to submit a jury instruction requiring the jury to reduce an award for lost future wages to present value.

At the time of trial, the trial court's submission of jury instructions was consonant with previous opinions of the Missouri Supreme Court and Court of Appeals refusing to submit present value instructions because the Missouri Approved Instructions did not call for one. *Bair v. St. Louis-San Francisco R. Co.*, 647 S.W.2d 507, 513 (Mo. banc 1983), *cert. denied, sub nom. Burlington Northern, Inc. v. Bair*, 464 U.S. 830 (1983); *Dunn v. St. Louis-San Francisco R. Co.*, 621 S.W.2d 245, 254 (Mo. banc 1981), *cert. denied, sub. nom.; Burlington Northern R. Co. v. Dunn*, 454 U.S. 1145 (1982); *Dickerson v. St. Louis Southwestern Ry. Co.*, 674 S.W.2d 165 (Mo.App. 1984); *Brotherton v. Burlington Northern R.R. Co.*, 672 S.W.2d 133 (Mo.App. 1984); *Fisher v. Burlington Northern R. Co.*, 640 S.W.2d 174 (Mo.App. 1982); *Marshell v. Burlington Northern R.R. Co.*, 637 S.W.2d 168 (Mo.App. 1982). However, after judgment by the trial court and prior to this decision, the United

States Supreme Court decided *St. Louis Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409 (1985). The Supreme Court concluded that Missouri courts' refusal to submit an instruction on present value is at odds with federal law. *Id.* at 412.

FELA cases adjudicated in state courts are to apply the state's procedural rules but the substantive law governing them is federal. *Id.* at 411. It is now well settled that jury instructions concerning the measure of damages in FELA cases is an issue of "substance" determined by federal law. *Id., citing, Norfolk & Western R. Co. v. Liepelt,* 444 U.S. 490, 493 (1980).

Federal law on the issue to instruct the jury on present value was established in *Chesapeake & Ohio R. Co. v. Kelly,* 241 U.S. 485, 491 (1916). The federal courts have relied on *Kelly* as a definitive statement of the law applicable in federal cases. *See Beanland v. Chicago R.I. & P.R. Co.,* 480 F.2d 109, 115 (8th Cir. 1973). As stated, the Supreme Court's statement that Missouri courts must submit a jury instruction on reducing loss of future wages to present value did not establish a new principal of law. Therefore, the point of law established in *Dickerson* is applicable to the case at bar.

The considerations of retroactivity as enumerated in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07 (1971) and *Ingle v. Illinois Cent. Gulf R. Co.,* 608 S.W.2d 76, 82-84 (Mo.App. 1980), *cert. denied,* 450 U.S. 916 (1981), where the court applied existing federal law to Missouri cases in the absence of a Missouri Approved Instruction are absent here.

Plaintiff challenges the application of the Supreme Court's decision in *Dickerson* to this case because defendant railroad did not request an instruction on present value nor was this claim of error presented to the court in its motion for new trial. The accepted rule of law states that if a party does not request an instruction there is no trial court error [except mandatory *MAI]. Louisville & N.R. Co. v. Holloway,* 246 U.S. 525, 528 (1918).

There is no doubt that had the railroad requested an instruction to reduce future lost wages to present value the court would have denied the request which would have been affirmed on appeal. Our Supreme Court in *Bair, citing, Dunn,* said, "In *Dunn,* at p. 253, we dealt with a very similar issue and held a present value instruction *was not appropriate under* MAI. We are not persuaded that federal law requires the instruction." (emphasis added) Four Court of Appeals' decisions approved the same rule. *See Dickerson,* 674 S.W.2d 165 (Mo.App. 1984); *Brotherton,* 672 S.W.2d 133 (Mo.App. 1984); *Fisher,* 640 S.W.2d 174 (Mo.App. 1982); *Marshell,* 637 S.W.2d 168 (Mo.App. 1982). The concept of present value was not argued by defendant at trial.[1] The fact that the verdict was for the plaintiff in the full amount of the prayer is conclusive that the jury did not consider or apply present value concepts to the lost wages claim.

We are now faced with balancing the railroad's reliance on prior Missouri decisions rendered after MAI which approved refusal of the instruction versus the general rule that the railroad is precluded from claiming error when there was no request at trial.

The United States Supreme Court's decision in *Dickerson* indicates Missouri courts erred on this issue after the advent of patterned Missouri instructions. Federal law has been unwavering on this point since the *Kelly* decision in 1916. Missouri consistently followed the federal law prior to MAI. *See Burtch v.*

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[1] Railroad did make the following argument:

> If you invest 100,000 at 12 percent you get $12,000. If you go up to $200,000 invested at 12 percent you get $24,000 a year. You all know that. At the end of the term of the certificate or the bond or whatever else you still have all your principal intact, you still have the $50,000 or $100,000 or $200,000. You still have that there.

Wabash Ry. Co., 236 S.W. 338 (Mo. banc 1921) and its progeny. Cases subsequent to the advent of MAI precluded an instruction on this point.

It was expressly held in *Dunn* and *Bair* that a defendant was not entitled to a present value instruction in FELA cases although evidence and argument on the issue were never foreclosed. These decisions conflict with Missouri cases prior to MAI and *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). We are bound by *Dunn* and *Bair*, Art. 5, § 2, Missouri Constitution. Because of the conflict between previous decisions of our Supreme Court decided on substantive grounds and *Dunn* and *Bair* decided on procedural grounds, and conflict between *Dunn* and *Bair* and the *Dickerson* opinion, we certify this cause to the Supreme Court for reexamination.

KENT E. KAROHL, Presiding Judge

/s/ PAUL J. SIMON, Judge — Concurs

/s/ GARY M. GAERTNER, Judge — Concurs

APPENDIX C

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Wednesday, October 24th, 1984

Cause No. 802-00509

Division No. 6

Jimmy Paul Besse,
Plaintiff,

vs.

Missouri Pacific Railroad Company,
Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, the parties appearing by their respective attorneys, and the issues having been duly tried and the jury having duly rendered its verdict.

It is hereby adjudged that plaintiff was damaged in the sum of $1,687,500.00.

Pursuant to the jury verdict on the claim between plaintiff and defendant for assessment of the proportions of fault for plaintiff's damage, plaintiff, Jimmy Paul Besse is 0% at fault and defendant, Missouri Pacific Railroad Company is 100% at fault.

Wherefore, it is considered and adjudged by the Court that the plaintiff, Jimmy Paul Besse have and recover of the defen-

dant, Missouri Pacific Railroad Company the sum of ONE MILLION SIX HUNDRED EIGHTY SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($1,687,500.00) DOLLARS, with interest thereon as provided by law, together with the costs of this proceeding and that execution issue therefor.

/s/ Michael F. Godfrey
Judge

10/31/84
Date approved

No. 86-1404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

JIMMY PAUL BESSE,
Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION

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The opinion of the Supreme Court of Missouri, en banc, affirming the judgment and verdict in favor of plaintiff in the trial court, is reported at 721 S.W.2d 740, and appears in the Petition as Appendix A, page A1. The opinion of the Missouri Court of Appeals, Eastern District is not reported because, under Missouri law, when the case is transferred to the Supreme Court by order of either that Court or the Court of Appeals, the Court of Appeals opinion is, in effect, vacated and of no precedential value and the case is decided by the Supreme Court as if on original appeal. See Rule 83.09, Missouri Rules of Civil Procedure. Petitioner has made that opinion a part of the Appendix to the Petition, and it appears as Appendix B at page A13. The judgment of the trial court appears in the Petition as Appendix C, at page A21.

JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1257(3). Respondent specifically denies that jurisdiction of any of the questions petitioner seeks to present is conferred upon this Court under Section 1257(3) for the reason, as will be more fully set forth below, that the judgment of the Missouri Supreme Court, en banc, with respect to the issues raised by petitioner, rests upon an independent and adequate state ground of decision, which bars review in this Court.

Respondent agrees that the Petition was timely filed within ninety (90) days of the decision below.

STATEMENT OF THE CASE

Petitioner's statement of the case does not constitute a fair and full statement of the facts relevant to the issues herein. In order to avoid repetition, additional relevant facts will be set forth under the appropriate point in the argument.

ARGUMENT

I.

The Writ Should Be Denied Because This Court Is Without Jurisdiction Of The Questions Petitioner Seeks To Present, In That The Judgment Of The Missouri Supreme Court Rests Upon An Independent And Adequate State Ground Of Decision.

This Court is without jurisdiction of any of the purported questions which Petitioner seeks to present. Each of those questions relates to petitioner railroad's claim that it is entitled to reversal of the judgment in respondent's favor because the jury was not given a present value instruction. However, there is one significant fact which is dispositive of this petition: **Petitioner never requested the trial court to give such an instruction.** The Missouri Supreme Court held that petitioner's claim had not been preserved for review as a matter of state procedural law precisely because of petitioner's failure to request the instruction at trial and did not, accordingly, reach that claim. The Missouri Supreme Court clearly acknowledged that this Court has held:

> . . . that the giving of such an instruction was mandated by federal law when requested. *St. Louis Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985)."

721 S.W.2d at 744. The Missouri Supreme Court held, however, that:

> "Under our procedural law, the trial court need not give an instruction unless a correct instruction is prepared and requested by counsel. Federal causes are tried in state courts under state procedural rules. The Supreme Court of the United States has the ultimate right to specify the matters about which FELA juries must be instructed, **but the parties must make appropriate requests.**"

721 S.W.2d at 744 (Emphasis Supplied). Thus, the Missouri Supreme Court held that the failure to request the instruction at trial "concludes the defendant." *Id.* This constitutes an independent and adequate state ground of decision which bars review in this Court. *E.g., Herb v. Pitcairn,* 324 U.S. 117, 65 S.Ct. 459 (1945); *Murdock v. City of Memphis,* 20 Wall. (87 U.S.) 590, 22 L.Ed. 429 (1875); *Eustis v. Bolles,* 150 U.S. 361, 14 S.Ct. 131 (1893); *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157, 37 S.Ct. 318 (1917); *Fox Film Corp. v. Muller,* 296 U.S. 207, 56 S.Ct. 183 (1935); *Michigan v. Tyler,* 436 U.S. 499, 512 n.7, 98 S.Ct. 1942, 1951 n.7 (1978). The adequacy and independence of the state ground is evident from the face of the opinion of the Missouri Supreme Court and fully meets the test of *Michigan v. Long,* 463 U.S. 1032, 1042, 103 S.Ct. 3469, 3476 [7, 8] (1983). Therefore, this Court is without jurisdiction to review any of the purported questions petitioner seeks to raise.

A refusal by a state court to reach the merits of a federal claim due to a failure to raise the claim in accordance with state procedural rules constitutes an independent and adequate state procedural ground for decision which will preclude review by this Court so long as the state's insistence upon compliance with that rule serves a legitimate state interest. *Henry v. Mississippi,* 379 U.S. 443, 448, 85 S.Ct. 564, 567 (1965).

The state procedural rule applied by the Missouri Supreme Court—that petitioner was required to prepare and request a present value at trial in order to preserve the issue for appeal—and that court's insistence on compliance with the rule, serves such a legitimate state interest. The Missouri rule is in fact similar to Rule 51 of the Federal Rules of Civil Procedure. This Court recently explained the interests served by rules, such as Rule 51 F.R.C.P., were as follows:

> "Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error."

Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736 (1977). This Court has characterized the state rule that a failure to object to a jury instruction at trial is a waiver of any claim of error as "normal and valid". *Hankerson v. North Carolina,* 432 U.S. 233, 244 n.8, 97 S.Ct. 2339, 2345-46 n.8 (1977). See also Rule 30 F.R.C.P. This Court has also very recently stated that the rule that it will not consider issues not raised or litigated below has "special force where the party seeking to argue the issue has failed to object to a jury instruction" pursuant to Rule 51. *City of Springfield v. Kibbe,* ____ U.S. ____, 107 S.Ct. 1114, 1115 (1987).

Not only is Missouri's rule "normal and valid", it does not in any manner unnecessarily burden the assertion of federal rights, nor is it applied discriminatorily to bar assertion of federal rights. To the contrary, it is consistently applied to the entire range of civil cases tried in the Missouri Courts. See review of Missouri rule and case law at pp. 7-8, n. 2 *infra.*

In the instant case, all of the instructions given by the trial court were identical to those prepared and submitted by the petitioner herein, defendant below, Missouri Pacific Railroad Company. The trial court gave each and every instruction which had been drafted, offered and requested by the petitioner. No present value instruction was drafted, offered or requested by the petitioner. Furthermore, the trial court did not refuse any present value instruction.

The transcript of the proceedings at the instruction conference (See Appendix, pp. A-1 to A-4) demonstrates that respondent's counsel, petitioner's counsel and the trial court had conferred concerning the instructions on the previous day. At that time, respondent had indicated his intention to have the court submit the case under the Missouri Approved Instructions (MAI) applicable to FELA cases (i.e., MAI 24.01, 8.02 and 36.01). Petitioner, however, had prepared instructions it intended to offer which were not-in-MAI. Petitioner's instructions had not and have never been approved by the Missouri

Supreme Court for use in FELA cases. Despite the fact that respondent had prepared and intended to submit the case under the applicable MAI FELA instructions and **petitioner had drafted and was prepared only to submit and offer its not-in-MAI, unapproved instructions, respondent acceded to petitioner's request and agreed to submit the case under the not-in-MAI instructions.** This is a permissible practice under Rule 70.02(b) V.A.M.R. which provides:

> "(B) **Missouri Approved Instructions exclude others.** Whenever Missouri approved instructions contains an instruction applicable in a particular case **which the appropriate party or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.**"

This rule provides that the MAI instructions are exclusive, **if the appropriate party or the court decides to submit same.** In the instant case, however, respondent did not invoke his right to have the case submitted in accordance with the applicable MAI FELA instructions. Instead, respondent adopted **petitioner's not-in-MAI** unapproved instructions. Moreover, the trial court also permitted the case to go to the jury on **petitioner's not-in-MAI** instructions.

Prior to the trial of the instant case, the Missouri Courts had held that a defendant railroad was entitled to a present value instruction, upon request, when the instruction was not precluded by the exclusivity of MAI.[1] *See, e.g., Prince v. Kansas City*

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[1] *Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W.2d 245, 253 [14] (Mo. banc 1981) *cert. den. sub. nom., Burlington Northern Railroad Company v. Dunn,* 454 U.S. 1145, 3102 S.Ct. 1007, 71 L.Ed.2d 298 (1981) held only that the MAI FELA damage instruction, submitted by plaintiff and given by the Court, was not to be further explained by a separate damage instruction submitted by defendant. In *Bair v. St. Louis-San Francisco Railway Company,* 647 S.W.2d 507, 510, 513 [2, 3, 12] (Mo. banc 1983) *cert. denied sub. nom. Burlington Northern, Inc. v. Bair,* 464 U.S. 830, 104 S.Ct. 107 78 L.Ed.2d 109 (1983), the Missouri Supreme Court followed *Dunn* on the in-

Southern Ry. Co., 229 S.W.2d 568, 575 [9] (Mo. 1950) where the Missouri Supreme Court expressly approved of the giving of such a present value instruction, on request, in an FELA case. **The same line of decisions also held that a railroad defendant was not entitled to raise an allegation of error on appeal concerning the absence of a present value instruction if the railroad had failed to request a present value instruction at trial during the instruction conference.** *Holman v. St. Louis-San Francisco Ry. Co.*, 278 S.W. 1000, 1008 (Mo. 1926), *Clark v. Chicago, R.I. & P. Ry. Co.*, 300 S.W. 758, 763-764 (Mo. 1927), *Moran v. Atchison, T. & S.F. Ry. Co.*, 48 S.W.2d 881, 887-888 (Mo. banc 1932), *cert. den.*, 287 U.S. 621, 53 S.Ct. 21, 77 L. Ed. 539 (1932), *Hancock v. Kansas City Terminal Ry. Co.*, 100 S.W.2d 570, 572-573 (Mo. 1936), *Wheeler v. Missouri-Kansas-Texas R. Co.*, 205 S.W.2d 906, 908 (Mo.App. 1947), *Pierce v. New York Cent. R. Co.*, 257 S.W.2d 84, 89-90 (Mo. 1953), and *Chaussard v. Kansas City Southern Railway Company*, 536 S.W.2d 822, 827 (Mo.App. 1976); *see also, Burtch v. Wabash Ry. Co.*, 236 S.W. 338 (Mo. 1921), *Pope v. Terminal R. Ass'n. of St. Louis*, 254 S.W. 43 (Mo. 1923). Said decisions had been rendered both before the Missouri Supreme Court's adoption of MAI (*see, Pierce v. New York Cent. R. Co.*, 257 S.W.2d 84, 89-90 (Mo. 1953) and after the adoption of MAI (*see, Chaussard v. Kansas City Southern Railway Company*, 536 S.W.2d 822, 827 (Mo.App. 1976)).

Nine previous Missouri appellate decisions had held that the railroad defendant's failure to request a present value instruction precluded the defendant from raising the absence of said

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structional issue but expressly recognized that present value was the proper measure for loss of future wages, that evidence was admissible and that argument concerning present value was proper. As to the instruction, both *Dunn* and *Bair* based their holdings *solely* on the exclusivity of MAI instructions when offered by the appropriate party and given by the Court. In this case, the exclusivity of MAI was not invoked. Therefore, *Dunn* and *Bair*, and the decisions of the Missouri Court of Appeals following *Dunn* and *Bair*, had no application to this case.

instruction as an allegation of error on appeal.[2] Despite said ap-

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[2] The application of this rule to present value instructions and FELA actions is simply one application of the well engrained Missouri procedural rules relating to jury instructions in civil cases. As a matter of Missouri procedural law, a trial court has no duty to instruct upon any issue of law in a case unless a party has drafted and requested that a proper jury instruction be given. *Wors v. Glasgow Village Supermarket, Inc.*, 460 S.W.2d 583, 589 [6] (Mo. 1970); *Sheinbein v. First Boston Corporation*, 670 S.W.2d 872, 878 [10] (Mo.App. 1984). If a party drafts and requests the Court to give an improper instruction, the trial court has no duty to either correct the instruction or prepare a proper instruction in its place. *Wors v. Glasgow Village Supermarkets, Inc.*, 460 S.W.2d 583, 589 [6] (Mo. 1970); *Sheinbein v. First Boston Corporation*, 670 S.W.2d 872, 878 [10] (Mo.App. 1984). Moreover, a trial court—in a civil case—has absolutely no duty to prepare a party's instructions under any circumstances. *Parker v. Wallace*, 431 S.W.2d 136, 139 [12] (Mo. 1968); *Sullivan v. KSDK/KSD-TV*, 661 S.W.2d 49, 51 [3, 4] (Mo.App. 1983). Consequently, it has been repeatedly held that a party cannot complain on appeal of the trial court's failure to instruct upon any issue of law unless that party has drafted a proper jury instruction on that issue, requested the trial court to give that instruction, the trial court has refused to give the instruction and the complaining party has moved for a new trial based upon the trial court's refusal to give the requested instruction. *See, Verdin v. Agners*, 715 S.W.2d 544, 546 [2] (Mo.App. 1986); *Hicks v. Smith*, 696 S.W.2d 855, 856 [2] (Mo.App. 1985); *Sullivan v. KSDK/KSD-TV*, 661 S.W.2d 49, 51 [3, 4] (Mo.App. 1983). *See also, Day v. Wells Fargo Guard Service Co.*, 711 S.W.2d 503, 507 n.1 (Mo. banc 1986); *Hodge v. Continental Western Insurance Company*, 722 S.W.2d 133, 136 [3] (Mo.App. 1986); *Manufacturer's American Bank v. Stamatis*, 719 S.W.2d 64, 69 [7] (Mo.App. 1986); *DeLong v. Osage Valley Electric Cooperative Association*, 716 S.W.2d 320, 232 [3] (Mo.App. 1986). Here, petitioner did not draft a present value instruction, did not request the trial court give a present value instruction, the trial court did not refuse to give a present value instruction, and petitioner did not move for a new trial upon said basis. Therefore, the Missouri Supreme Court held, consistently with other Missouri decisions on this issue, that as a matter of state procedural law petitioner was precluded from raising its allegation of error on appeal. *See, Day v. Wells Fargo Guard Service Co.*, 711 S.W.2d 503, 507 (Mo. banc 1986) and dissenting opinion where the Missouri Supreme Court, in a strikingly similar procedural situation, held the defendant's failure to properly challenge an instruction at trial precluded review of the instruction on appeal.

pellate decisions as well as respondents' and the trial court's willingness—documented in the record—to not invoke the exclusivity of MAI and Rule 70.02(b) and in fact adopt every one of **petitioner's not-in-MAI** instructions, this petitioner still did not request that a present value instruction be given. Petitioner failed to request such an instruction even though the above-referenced Missouri decisions repeatedly ruled that a defendant's failure to request the instruction precluded defendant from raising any allegation of error on appeal with regard to the lack of a present value instruction. Indeed, petitioner failed to request said instruction even though respondent and the trial court repeatedly urged and prodded petitioner to advise of any errors or deficiencies in the instructions. (See App. pp. A-1 - A-4) Rather than advise respondent and the trial court of the alleged deficiency—lack of a present value instruction—that petitioner now requests this Court to review, petitioner sat mute merely objecting "generally" to the instructions which it had itself drafted and submitted, **but never drafting, submitting, nor requesting—as it was required to do—a present value instruction.** Nor did petitioner—as it was required to do—take the additional required step of moving for a new trial based upon its present value instruction arguments.

As pointed out immediately above, petitioner simply did not request—as it was required to do—a present value instruction. Nor did petitioner take the second further required step of moving for a new trial based upon the failure of the trial court to instruct upon present value. Only after new counsel were obtained and the case had been appealed did petitioner—for the first time—attempt to raise the issue of lack of a present value instruction. The Missouri Supreme Court, en banc, affirmed concluding petitioner was not entitled to raise on appeal the absence value instruction because none was requested. *Zesse v. Missouri Pacific Railroad Company,* 721 S.W.2d 740, 741 (Mo.banc 1986). Here, petitioner's failure to prepare and request a present value instruction (as well as its later failure to raise the issue in its motion for new trial) precluded petitioner's claim of error as a matter of Missouri State procedural law.

In the instant case, respondent adduced evidence that he had sustained a past wage loss of approximately $100,000 between the date of his injury and the time of trial. In addition, respondent adduced evidence of his current (1984) wage and fringe benefit rates. Respondent did not project nor attempt to project any future increases in wages or fringe benefits.[3]

Petitioner did not object to the admission of any of respondent's evidence concerning his past or future wage loss. Nor did petitioner offer any evidence whatsoever with respect to respondent's past or future wage loss. Nor did petitioner offer any evidence pertaining to the present value of respondent's future wage loss. Notably, the Missouri State Supreme Court rendering the decision in the instant case had immediately prior to the *Besse* decision held in *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 387-388 [5-7] (Mo.banc 1986) that a defendant — in very similar circumstances — was precluded from asserting, on appeal, error arising from plaintiff's presentation concerning future loss of wages and present value.

Moreover, it is clear that both petitioner and respondent (Petition for Certiorari, pp. 4-5, n.1) expressly advised the jury

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[3] In this regard, the evidence demonstrated respondent's wage rates had incrased 301% ($4.38 to $13.20) during the period from 1971-1984 (Pl. Ex. 49). Similarly, respondent's fringe benefits had increased from in the range of 200% (Pl. Ex. 50) to 558% (Pl. Ex. 51) during the approximately 10-12 years prior to trial. Thus, although respondent's evidence did not give petitioner the benefit of applying a discount rate, neither did it give respondent the benefit of anticipating future increases due to price inflation or improved societal productivity. These factors tend to offset one another. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 550-551 n. 31 and accompanying text, 103 S.Ct. 2541, 2557 n.31 and accompanying text (1983) This Court in *Pfeifer* recognized that a damage computation discounting an award of future lost earnings by a market interest rate without taking into account the extent to which such a rate either anticipates or is offset by future price inflation or societal productivity gains may produce an inadequate award, under compensating an injured plaintiff. 462 U.S. at 541-542, 103 S.Ct. at 2552.

"present value" was the proper measure of damages. The jury, therefore, was properly advised even though petitioner utterly failed to draft or request a present value instruction.

A point which should be made clear is that the instructions drafted and submitted by petitioner and given by the trial court with the express acquiescence of respondent were not only not-in-MAI instructions but were, in fact, prohibited by MAI. The verdict director, comparative fault instruction and form of verdict were the type that the Missouri appellate courts have held were not to be given in FELA cases. *Anderson v. Burlington Northern Railroad Company,* 700 S.W.2d 469, 478-479 [19, 20] (Mo.App. 1985), *cert. den.* ____ U.S. ____, 106 S.Ct. 1975 (1986). Respondent's counsel permitted petitioner's counsel to instruct in this manner even though the same counsel had successfully objected to said instructions in *Anderson.* Moreover, the damage instruction contained language (e.g. "direct result") which was specifically prohibited by MAI[4] and prior Missouri appellate decisions. *See, Snyder v. Chicago, Rock Island & Pacific Railroad Company,* 521 S.W.2d 161, 165 [11, 12] (Mo.App. 1973) wherein the Missouri Court of Appeals reversed a judgment in favor of defendant railroad because it included the prohibited language, "direct result", in the railroad's converse instruction.

The point is that neither respondent nor the trial court restricted petitioner to MAI FELA instructions. To the contrary, petitioner drafted and submitted and the trial court gave instructions which were not-in-MAI and in fact were prohibited

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[4] See Committee's Comment (1981 Revision) wherein it is stated that: "This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplication of MAI 4.01 with two exceptions. The word "*direct*" is deleted from the fifth line of MAI 4.01. *This is required in an F.E.L.A. case* so that the instruction complies with the correct substantive law, *Wilmoth v. Rock Island ry.*, 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 314 (1969); and *Rogers v. Mo. Pac. Ry.*, 352 U.S. 500 (1957)."

by MAI. Respondent abandoned his own MAI FELA instructions and permitted petitioner's instruction to be given even though respondent could have excluded said instructions. Petitioner, nonetheless, never drafted nor requested the not-in-MAI present value instruction it *now* contends it desired.

Petitioner's not drafting or submitting a present value instruction, at trial, is consistent with the rest of petitioner's trial strategy. Although petitioner argued as it had a right to the earning power of money and present value, not once during petitioner's argument did it suggest any sum that represented or reflected the present value of respondent's future loss of earnings. Nor did petitioner suggest any sum that represented petitioner's opinion of fair and just compensation for respondent's injuries. Rather petitioner assiduously and studiously avoided any suggestion that the jury should return any amount for respondent, contending instead that the jury should return a defendant's verdict. Given the fact petitioner intended to request a defendant's verdict, intended to not suggest any sum of money as that which would fairly and justly compensate respondent, and intended not to suggest any sum as the present value of respondent's future loss of earnings, it is not surprising that it neither desired nor requested a present value instruction nor moved for a new trial because none was given.

For the foregoing reasons, it is respectfully submitted that, on this record, petitioner's failure to request a present value instruction at trial is clearly an independent and adequate state ground which precludes review in this Court.

Petitioner's focus on the retroactivity of *Dickerson* is no more than an attempt to divert attention from petitioner's procedural default. *Dickerson* unquestionably applies retroactively to cases pending on direct review when it was decided but the right to claim that retroactive application presupposes that the issue has been properly raised and preserved in accordance with state procedural law. This Court has explicitly recognized the difference between a holding that a given decision is to be accorded complete retroactive effect and the right of a litigant to

claim that retroactive application after a procedural default. Even when a decision is accorded complete retroactive effect, a state court may still enforce "the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." *Hankerson v. North Carolina,* 432 U.S. 233, 244 n.8, 97 S.Ct. 2339, 2345-6 n.8 (1977); *Engle v. Issac,* 456 U.S. 107, 134 n.43 and accompanying text, 102 S.Ct. 1558, 1575 n.43 and accompanying text (1982). The question before this Court is not whether *Dickerson* applies retroactively. The question is whether this petition may invoke the jurisdiction of this Court to claim that retroactive application when the state court has refused to reach the issue because petitioner did not properly raise and preserve the issue under state procedural law by requesting a present value instruction at trial. The answer, as demonstrated above, is "No."

Finally, in addition to thencases cited above, the Court's attention is also respectfully invited to the recent decision in *City of Springfield v. Kibbe,* ____ U.S. ____, 107 S.Ct. 1114 (1987). In *Kibbe,* which arose in the federal system, this Court dismissed a writ of certiorari as improvidently granted when it became apparent that the petitioner had not raised any objection at trial to instructions containing the standard of liability it sought to challenge in this Court. In so doing this Court observed:

> "[1] We ordinarilly will not decide questions not raised or litigated in the lower courts. See *California v. Taylor,* 353 U.S. 553, 556, n.2, 77 S.Ct. 1037, 1039, n.2, 1 L.Ed.2d 1034 (1957). That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving...[of] an instruction unless he objects thereto before the jury retires to consider its verdict."

____ U.S. at ____, 107 S.Ct. at 1115.

There was, of course, no jurisdictional bar because the case arose in the federal, not the state courts. This Court nevertheless held:

> "We think, however, that there would be considerable prudential objection to reversing a judgment because of instructions that the petitioner accepted, and indeed itself requested."

____ U.S. at ____, 107 S.Ct. at 1116. As set forth above, the instructions given by the trial court in the instant case were similarly prepared and accepted by this petitioner.

The writ should be denied.

II.

Petitioner's Suggestion That This Court Adopt The "Cause And Actual Prejudice" Standard Used In Habeas Corpus Cases In This Civil Case On Direct Review Is Completely Without Merit And Is Contrary To The Well Established Distinctions Between This Court's Appellate Jurisdiction Under 28 U.S.C. §1257 And The Federal Habeas Jurisdiction. Further, This Petitioner, On This Record, Cannot Satisfy The Cause And Actual Prejudice Test In Any Event.

Petitoner's argument that this Court adopt the "cause and actual prejudice" standard employed by this Court in habeas corpus cases, see *Wainwright v. Sykes,* 435 U.S. 72, 97 S.Ct. 2497 (1977), to avoid the independent and adequate state procedural ground of decision which deprives this Court of jurisdiction of this civil case on direct review is totally without merit. In support of its contention, petitioner makes the following extraordinary and blatantly erroneous statement, *ipse dixit:*

> The same standard [habeas corpus cause and actual prejudice test] should be applied to a question of waiver of a federal substantive right in civil cases tried in state courts as a result of a default under state procedural rules *because the same considerations govern both issues.*

Petition at 11 (bracketed material and emphasis supplied). Such a statement evidences an almost incomprehensible lack of appreciation for the special role set aside for habeas corpus in our

law and tradition and the manner in which that role differs from the role and jurisdiction of this Court on direct review of state court judgments.

The source and the scope of the power of the federal courts to inquire into whether a person is being confined in violation of the Constitution in a habeas corpus proceeding is fundamentally different, and substantially broader, than the source and scope of the power and jurisdiction of this Court with respect to state court civil judgments on direct review. This is no less so when the refusal of a state court to grant relief claimed under federal law is based upon a procedural default under state law, which is said to constitute an independent and adequate state ground of decision. This Court has expressly held and recognized that procedural defaults *bar* this Court from considering an allegation of error, on direct review, because of the independent and adequate state ground exception of 28 U.S.C. §1257, even though the identical procedural default would not bar habeas jurisdiction under 28 U.S.C. §2254. In *Fay,* this Court stated:

> *The doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review* is not to be extended to limit the power granted the federal courts under the federal habeas statute.

Fay v. Noia, 372 U.S. 391, 399, 83 S.Ct. 822, 827 (1963) (Emphasis supplied). The existence of an independent and adequate state procedural ground for decision precludes direct review by this Court as a matter of jurisdiction and power. To the extent a federal habeas court recognizes such procedural defaults as a bar to reaching constitutional claims, it does so only as a matter comity and not due to a lack of power. See generally, *Fay v. Noia,* 372 U.S. 391, 429-431, 83 S.Ct. 822, 824 (1963); *Wainwright v. Sykes,* 433 U.S. 72, 81-87, 97 S.Ct. 2497, 2503-2506 (1977). *Fay* and *Wainwright* both emphasize the heavy burden placed upon federalism concerns by the broad scope of federal habeas jurisdiction, burdens justified only by the special con-

stitutional role of the writ of habeas corpus in our system, a factor which is not present in direct review of state civil judgments.

Adoption of petitioner's argument would not only disregard those federalims concerns and the statutory limits imposed upon this Court's appellate jurisdiction by 28 U.S.C. §1257, but would also vastly increase the burden of this Court's workload. Every losing litigant in a state civil case would thereby be given an incentive to search the record for a federal issue to support a request for this Court to review the judgment, and to seek to evade the consequences of failure to properly raise and present the issue in the state courts by appeal to this "cause and prejudice" standard. Since the "cause and prejudice" standard is employed in habeas cases to evaluate appellate defaults as well as defaults at trial, *Murray v. Carrier,* ____ U.S. ____, 106 S.Ct. 2639 (1986), litigants would be invited to try to raise federal issues for the first time in this Court, a practice which would be directly contrary to the plain language of 28 U.S.C. §1257 and this Court's consistent position that it is without jurisdiction of alleged federal questions which have "never been raised, preserved or passed upon in the state courts below". *Cardinale v. Louisiana,* 394 U.S. 437, 438, 895 S.Ct. 1161, 1162 (1969). The doctrine of "cause and prejudice" developed under *Wainwright v. Sykes* for federal habeas cases under 28 U.S.C. §2254, therefore, has no place and plays absolutely no role under 28 U.S.C. §1257.

Even if, *arguendo,* the "cause and prejudice" standard were held to apply in this civil case on direct review, petitioner would not be entitled to any relief. Petitioner's request to be excused from its procedural default completely and decisively fails to satisfy the "cause and prejudice" test.

With respect to "cause", the complete lack of merit in petitioner's arguments becomes readily apparent upon a comparison of *Engle v. Issac,* 456 U.S. 107, 102 S.Ct. 1558 (1982), with *Reed v. Ross,* 468 U.S. 1, 104 S.Ct. 2901 (1984), and an application of those cases to the record in the instant case. *Engle*

and *Reed* were both habeas cases which interpreted the "cause" aspect of the test with regard to failures of criminal defendants to object in state court to jury instructions placing the burden of proof of self-defense on defendants. In 1975, this Court, relying heavily on its prior decision in *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068 (1970), decided *Mullaney v. Wilbur,* 421 U.S. 648, 95 S.Ct. 1881 (1975). The reasoning of *Mullaney* plainly and explicitly destroyed the validity of instructions requiring defendants charged with murder to prove the affirmative defense that the act was done in the heat of passion on sudden provocation to reduce the offense to manslaughter. *Mullaney* was thereafter widely regarded as also requiring in all cases that the State prove absence of self defense beyond a reasonable doubt. See *Engle,* 456 U.S. at 122 n.23 and accompanying text, 102 S.Ct. at 1569, n.23 and accompanying text. Although this Court has very recently declined to adopt such a broad rule, *Martin v. Ohio,* ____ U.S. ____, 107 S.Ct. 1098 (1987), that view of *Mullaney* formed the substantive basis of the habeas petitions in *Engle* and *Reed.* In each case, the question for decision was whether the habeas petitioners had demonstrated sufficient "cause" for their procedural defaults under the "cause and actual prejudice" test.

It is most respectfully urged and submitted that if it is assumed, *arguendo,* that the habeas "cause and actual prejudice" test is applicable to this civil case on direct review, *Engle* is controlling on this record and requires a finding in this case that there is insufficient cause for the railroad's procedural default.

In *Engle,* each of the three habeas petitioners had been tried in Ohio, two for homicide and the third for felonious assault, *after* the date of the decision in *Winship.* Two were tried in the five year period *after Winship but before Mullaney.* None made any objection at trial to instructions which required them to bear the burden of proof on self defense by a preponderance of the evidence. Each thereby violated Ohio's procedural rule requiring contemporaneous objections to jury instructions, a

default which was adequate, under Ohio procedural law, to bar appellate consideration of the issue.

In seeking to establish "cause" for their procedural defaults, the *Engle* habeas petitioners argued that it would have been futile to object to the instructions because Ohio had always consistently required defendant's to bear the burden of proof on self defense. They further argued that they could not have known that the Due Process Clause might invalidate those instructions. In rejecting the futility claim this Court held:

> "We note at the outset that the *futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial.* If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, *he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.* Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes.*"

456 U.S. at 130, 102 S.Ct. at 1573 (footnote omitted).

This Court further held that *Winship,* decided some four years prior to the defendants' state court trials, had laid the basis for their claims. Noting that other defense counsel after *Winship* used language from that case to challenge burden shifting instructions, this Court rejected the claim that the defendants had "cause" for their defaults because of alleged unawareness of the issue. This Court concluded that:

> "Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default."

456 U.S. at 134, 102 S.Ct. at 1575 (footnote omitted). In a footnote, this Court reiterated the principle set forth in the majority opinion in *Hankerson v. North Carolina,* 432 U.S. 233, 244 n.8, 97 S.Ct. 2339, 2345-46 n.8 (1977), that the States:

> . . . may be able to insulate past convictions [from the effect of *Mullaney*] by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error."

Quoted in *Engle,* 456 U.S. at 134 n.43, 102 S.Ct. at 1575 n.43 (bracketed material supplied by the Court in *Engle*). This Court went on to note that "we accept the force of that language as applied to defendants tried after *Winship." Id.* Thus, this Court in *Engle* held that there was insufficient cause to relieve the defendants from their state court procedural defaults in that case because each of the *Engle* petitioners was tried after *Winship,* and held that assertion of the burden of proof claims was accordingly barred because of the failure of the petitioner's to object to the instructions at their state court trials.

In *Reed v. Ross,* 468 U.S. 1, 104 S.Ct. 2901 (1984), this Court reached a different result in a habeas petition filed by a North Carolina prisoner who had failed to challenge instructions imposing upon him the burden of proving lack of malice and self-defense in his state court trial but whose trial had taken place *prior* to *Winship.* This Court found sufficient cause for the procedural default in *Reed,* not because of any allegation of futility, but because prior to *Winship* the idea of challenging such burden shifting instructions was so novel that the basis of the claim was not "reasonably available to counsel." 468 U.S. at ____, 104 S.Ct. at 2910. The test of novelty set forth by this Court presumes that the question be one sufficiently novel that it is safe to assume that counsel is unaware of its "latent existence", 468 U.S. ____, 104 S.Ct. at 2910, *so that a deliberate choice of any sort not to raise an issue of which counsel was aware cannot be attributed to counsel.*

On the record in the instant case, *Engle* compels the conclusion that the railroad has totally failed to establish "cause" for its procedural default. **Petitioner's argument is, essentially, the same futility argument rejected in** *Engle*. Just as the *Engle* petitioners claimed futility because the Ohio courts had long required defendants to bear the burden of proof on self defense, petitioner here claims futility because of Missouri decisions holding that, under MAI, it was not error to refuse a present value instruction. This Court held directly in *Engle:*

> "...that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial."

456 U.S. at 130, 102 S.Ct. at 1573. In addition, on this record as set forth above under Point I, petitioner's argument, that it did not request a present value instruction at trial because it was discouraged by prior Missouri decisions holding that it was not error to refuse the instruction because it was not in MAI, is particularly unconvincing in light of the willingness of both respondent's counsel and the trial court to accept and give instructions prepared by the railroad which also differed from and were contrary to MAI[3], and in light of the railroad's silence at trial in response to respondent's request and solicitation that it "advise the Court of any deficiencies or any problems with the instructions that are being given by the Court." (T. III, 465-466) (Appendix at A-4)

The railroad's argument, see Petition at 12-13, makes it clear that it was aware of the present value instruction issue at trial but deliberately chose not to raise it. The record refutes petitioner's claim of "cause".

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[3] In fact, given respondent's decision to accept petitioner's not-in-MAI instructions and his decision to not invoke the exclusivity of MAI, those cases had no application to the instant case. See n.1 at p. 6, *supra*.

Nor could the present value instruction be characterized as so novel at the time of trial in October, 1984, as to be unavailable within the meaning of *Reed*. To the contrary, as in *Engle*, the railroad's claims "were far from unknown at the time" of the trial here. 456 U.S. at 131, 102 S.Ct. 1558. This Court's discussion of that issue in *Dickerson* makes this clear. After noting that:

> "...it is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of "substance" determined by federal law. *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 493, 100 S.Ct. 755, 757, 62 L.Ed.2d 689 (1980)."

470 U.S. at ____, 105 S.Ct. at 1348, this Court went on to observe:

> "[3] Not only is it a federal question, but it is also one to which existing law provides a clear answer. Nearly seventy years ago, this Court held that a defendant in an FELA case is entitled to have the jury instructed that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only." *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916)....
>
> ...We have never disapproved of *Kelly* or its rationale. The federal Courts of Appeals have continued to rely on *Kelly* as a definitive statement of the law applicable to FELA cases, *see, e.g., Beanland v. Chicago R.I. & P.R. Co.*, 480 F.2d 109, 115 (CA8 1973), and we have ourselves recently reaffirmed our adherence to *Kelly's* principle that damage awards in suits governed by federal law should be based on present value. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, ____, 103 S.Ct. 2541, ____, 76 L.Ed.2d 768 (1983)."

St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, ____, 105 S.Ct. 1347, 1348-49 (1985). Each of the cases cited

above was decided well before the trial in the instant case in October, 1984. *Kelly,* of course, although not a recent decision, was directly on point involving an FELA case tried in a state court.

Liepelt, decided in 1980, reasserted the role of federal substantive law as to the measure of damages in FELA actions and also expressly reaffirmed the continuing vitality of *Kelly:*

> "[1] Whether it was error to refuse that instruction, as well as the question whether evidence concerning the federal taxes on the decedent's earnings was properly excluded, is a matter governed by federal law. It has long been settled that questions concerning the measure of damages in an FELA action are federal in character. *See, e.g., Michigan Central R. Co. v. Vreeland,* 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417. This is true even if the action is brought in state court. *See, e.g., Chesapeake & Ohio R. Co. v. Kelly,* 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117."

444 U.S. at 493, 100 S.Ct. at 755.

The Missouri Court of Appeals, Eastern District, implied its own awareness that the issue might warrant re-examination by its citation of *Kelly* in the original *Dickerson* opinion, 674 S.W.2d 165 (Mo.App. 1984) decided months before the trial in the instant case. After referring to the general MAI rules, the court cited *Kelly* in the following manner: "but cf. *Chesapeake & Ohio Railway Co. v. Kelly,* 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916) (on writ of error to the Court of Appeals of Kentucky, the U.S. Supreme Court reversed and remanded the case because of the trial court's refusal to give a requested present value instruction)." 674 S.W.2d at 170.

The foregoing demonstrates that the existence of the present value issue was abundantly available to counsel for the railroad in the instant case. Comparing this case to *Engle* and *Reed, Liepelt* may be regarded as the direct analogue of *Winship,* in

that *Liepelt* clearly laid the modern basis of the present value instruction claim. Other counsel, notably counsel for the railroad in *Dickerson,* perceived and pressed the claim in a number of cases that railroads were entitled to the instruction upon request not withstanding the structure of MAI. See cases cited at p. 11-12 of the Petition. This was done by making the appropriate request at trial and preserving the issue in the appellate process. As this Court stated in *Engle:*

> "Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default."

456 U.S. at 134, 102 S.Ct. at 1575.

It should also be noted that this Court, in *Smith v. Murray,* ____ U.S. ____, 106 S.Ct. 2663 (1986), recently set forth its interpretation of *Engle* and *Reed,* one which is fully consistent with and supports the view of those cases set forth herein. See esp. 106 S.Ct. at 2667-68.

The foregoing demonstrates that this petitioner, whose case was tried long after *Liepelt,* has wholly failed to establish cause for its procedural default, just as the *Engle* petitioners failed, because their cases were tried after *Winship.*[6] Petitioner's contentions are completely without merit.

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[6] Nor can petitioner establish "actual prejudice." In this case, respondent's projection of his future wages and fringe benefits were based upon the level of wages and benefits in effect at the time of trial. No anticipated future increases in either wages or benefits due to price inflation or improved societal productivity were buit into the projections of the loss of future earnings. Future damages were computed in this manner despite the fact that the evidence as to past loss of earnings demonstrated a 301% increase in respondent's wage rates from 1971-1984 (Pl. Ex. 49) and an increase in respondent's in the range of 200% (Pl. Ex. 50) to 558% (Pl. Ex. 51) in the 10-12 years prior to trial. Thus, although respondent's evidence did not give petitioner the

III.

Even If It Is Assumed, Arguendo, That This Court Has Jurisdiction Of The Questions Petitioner Seeks To Present, The Writ Should Still Be Denied Because The Judgment Of The Court Below Reaches A Result In Accord With Settled Federal Substantive Law. The Judgment Does Not Therefor Warrant Review By This Court.

Even if it is assumed, *arguendo,* that this Court has jurisdiction of the questions Petitioner seeks to present, the writ should

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benefit of applying a discount rate, neither did it give respondent the benefit of anticipating future increase due to price inflation or improved societal productivity. These factors may well tend to offset one another. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 551 n.31 and accompanying text, 103 S.Ct. 2541, 2557 n.31 and accompanying text (1983). This Court in *Pfeifer* recognized that a damage computation discounting an award of future lost earnings by a market interest rate without taking into account the extent to which such a rate either anticipates or is offset by future price inflation or societal productivity gains may well produce an inadequate award, under compensating an injured plaintiff, 462 U.S. at 541-42, 103 S.Ct. at 2552.

Petitioner incorrectly asserts that *Pfeifer* "rejected" the total offset theory. (Petition at 9, n.4) *Pfeifer* held only that this Court would not impose the total offset method as a mandatory rule of federal decision over a defendant's objection at trial. This Court noted that the Carlson method, which posits that price inflation and societal productivity increases offset the entire market interest rate, has the virtue of simplicity and may be accurate. It was noted that the Carlson method might still even under compensate some plaintiffs. See 462 U.S. at 550-51, n.31 and accompanying text, 103 S.Ct. at 2557 n.31 and accompanying text. This Court left it open for the parties to select such a method it desired.

In this case, respondent's evidence on damages came in without objection. Petitioner chose not to present evidence on or argue the application of a discount rate to reach present value. It's strategy was to argue about how many dollars one could earn per annum given a particular size of award and market interest rate, leaving the principal intact. See, Petition at 4-5, n.1.

Given the above described method used by respondent to present the issue of damages, and the railroad's choice of strategy, no actual prejudice can be demonstrated on this record.

still be denied because this Court's prior cases hold, as a matter of federal substantive law, that when the trial court in a FELA action gives a proper general damage instruction (as was done in the instant case), there is no error in failing to give a present value instruction, unless the defendant railroad has requested a proper present value instruction. Under this Court's prior decisions, a general damage instruction, such as the one drafted and submitted by the petitioner railroad and given by the trial court in the instant case, is a proper and adequate statement of the federal substantive rules as to damages and that—in the absence of a request by the defendant for a proper present value instruction—no further instruction of any sort with respect to present value need be given. In short, the result reached by the Court below is completely in accord with settled federal substantive law, and the judgment, therefore, does not warrant review by this Court, under the criteria set forth in Rule 17 of this Court's Rules.

In *Chesapeake & Ohio Railway Company v. Kelly,* 241 U.S. 485, 36 S.Ct. 630 (1916), this Court held that in an FELA action a defendant railroad, **which had requested a proper present value instruction,** was entitled upon that request to have said instruction given in an FELA action tried in the state court. That holding was reiterated most recently by this Court in *St. Louis-Southwestern Railway Company v. Dickerson,* 470 U.S. ____, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). The holdings in these two cases are identical: When an FELA defendant railroad **requests** a proper present value instruction, said instruction must be given. This Court on the other hand has **never** held that, in the **absence of a request by a defendant railroad,** a present value instruction must be given.

As stated above, this Court's holding in *Chesapeake & Ohio Railway Company v. Kelly,* set forth in the rule regarding a proper present value instruction **requested by defendant railroad.** Only two years later, in the case of *Louisville & N.R. Co. v. Holloway,* 247 U.S. 525, 38 S.Ct. 379 (1918), this Court held expressly that in an FELA action where a proper, although

general, damage instruction had been given, and **no request** for a proper present value instruction was made by the defendant railroad, there was no error in the trial court's having not given any such instruction. In the *Holloway* case, the state trial court gave the following damage instruction:

> "The measure of recovery if you find for the plaintiff, being such an amount in damages as will *fairly and reasonably compensate* the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed; to wit: $50,000."

Louisville & N.R. Co. v. Holloway, 246 U.S. 525, 38 S.Ct. 380, n.1. (Emphasis supplied). Notably, the instruction given in the *Holloway* case was substantially identical to the instruction given by the trial court, at petitioner's behest, in the instant case. The instruction in the instant case was as follows:

> "If you find the issues in favor of plaintiff, then you must determine the total amount of plaintiff's damages to be such sum as you believe will *fairly and justly compensate* plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the occurrence of February 24, 1977. Any award you make is not subject to income tax." (L.F.)

Defendant railroad in *Holloway,* nevertheless contended that it was error for the trial court to give such instruction but fail to give a supplemental present value instruction. Specifically, defendant railroad's assignment of error was as follows:

> "That the Court of Appeals erred in approving the giving of an instruction and the refusal of another [footnote omitted] by which the trial court had denied to the company the benefit of the rule declared in *Chesapeake & Ohio Ry. v. Kelly,* 241 U.S. 485, 491, 36 Sup. Ct. 630, 60 L.Ed. 1117, L. R. A. 1917F, 367, that in computing damages recoverable for the deprivation of future financial

benefits, *the verdict should be based on their present value.*"

This Court, in rendering its decision affirming the judgment for plaintiff in *Holloway* noted first of all that the instruction given by the trial court (which is nearly identical to the one given in the instant case) was a proper and adequate statement of the measure of damages to be afforded plaintiff and that also, in the absence of any request for a proper supplemental instruction on present value, no error occurred and the judgment in favor of plaintiff must be affirmed. Expressly, this Court held:

> "[1-4] First. *The instruction given, though general, was correct.* It declared that the plaintiff was entitled to recover "*such an amount in damages as will fairly and reasonably compensate*" the widow for the loss of pecuniary benefits she might reasonably have received" but for her husband's death. This ruling did *not* imply that the verdict should be for the aggregate of the several benefits payable at different times, **without making any allowance** for the fact **that the whole amount of the verdict would be presently paid at one time. The instruction bore rather an implication to the contrary; for the sum was expressly stated to be that which would "compensate".** The language used was similar to that in which this court has **since expressed,** in *Chesapeake & Ohio Ry. v. Kelly, supra,* 241 U.S. 489, 36 Sup. Ct. 630, 60 L.Ed. 1117, L. R. A. 1917F, 367, the measure of damages which should be applied. **The Company had, of course, the right to require that this general instruction be supplemented by another calling attention to the fact that, in estimating what amount would compensate the widow, future benefits must be considered at their present value. But it did not ask for any such instruction.** Instead it erroneously sought to subject the jury's estimate to two rigid mathematical limitations: (1) That money would be worth to the widow six per cent., the legal rate of interest; (2) that the period during which the future benefits would have continued was

> 28.62 years—the life expectancy of the husband according to one of several well known actuarial tables. The Company was not entitled to have the jury instructed as matter of law either that money was worth that rate, or that the deceased would not in any event have outlived his probable expectancy. See *Chesapeake & Ohio Ry. v. Kelly, supra,* 241 U.S. 490-492, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367. Nor need we determine whether the **local rule of practice,** that if instructions are offered upon any issue respecting which the jury should be instructed and they are incorrect inform or substance it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in place of the defective one, see *Chesapeake & Ohio Ry. v. De Atley,* 241 U.S. 310, 316, 36 Sup. Ct. 564, 60 L. Ed. 1016), was applicable in the case at bar. **That is a question of state law, with which we have no concern."**

Louisville & N.R. v. Holloway, 246 U.S. 525, 38 S.Ct. 279 (Emphasis supplied). The *Holloway* decision, therefore, makes it abundantly plain that a general damage instruction advising that the jury must **"fairly and reasonably compensate"** plaintiff is substantively **correct** and **adequate** unless defendant railroad has drafted, offered and requested that the trial court **supplement** that instruction by advising the jury that in awarding the amount that would "fairly and reasonably compensate" the plaintiff, "future benefits must be considered at their present value". In the instant case, the instruciton that the jury award "such sum as you believe will fairly and justly compensate plaintiff" was substantively correct and adequate. In the instant case, as in *Holloway,* defendant railroad had the right to but failed to request further proper instruction that "future benefits be considered at their present value". Consequently, the damage instruction given was substantively correct and adequate and no error could occur as a matter of federal substantive law in the absence of a request by the railroad for further instruction on the issue of present value.

This Court's decision in *Holloway* further uerscores that, as a matter of substantive iaw, it is solely defendant's duty to draft, submit and request a *proper* present value instruction. In the absence of defendant drafting, submitting and requesting a *proper* present value instruction the trial court has no duty—as a matter of federal substantive law—to instruct on the issue of present value. Furthermore, neither plaintiff nor the trial court has any duty to correct an improper present value instruction offered by a defendant or to submit one on their own. The court's only duty is to give a proper present value instruction after defendant has drafted, submitted and requested the *proper* instruction be given.

Approximately ten years after the *Holloway* decision, this Court unequivocally reiterated the principle that the defendant railroad, in an FELA case, has *the burden of requesting a supplemental present value instruction* if it is dissatisfied with the instruction on damages given by the Court. In *Western & Atlantic R.R. v. Hughes,* 278 U.s. 496, 500, 49 S.Ct. 231, 232 (1929) this Court stated the following:

> "The railroad argues also that the **charge failed to make it clear to the jury that, in computing the damages recoverable for the operation of future benefits, adequate allowance must be made, according to circumstances, for the earning power of money, that the verdict should be for the present value of the anticipated benefits,** and that the legal rate of interest is not necessarily the rate to be applied in making the computation. *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117; *Gulf, Colorado & Santa Fe Ry. Co. v. Mosler,* 275 U.S. 133, 48 S.Ct. 49, 72 L.Ed. 200. **There is no room for a contention that the charge failed to state correctly the applicable rule. If more detailed instruction was desired, it was incumbent upon the Railroad to make a request therefor. Louisville & Nashville R. Co. v. Holloway,** 246 U.S. 525, 38 S.Ct. 379, 62 L.Ed. 867. It did not do so.
>
> Affirmed."

The rules pertaining to present value instructions in FELA cases as enunciated by this Court in *Kelly, Holloway* and *Hughes* may be stated as follows: A damage instruction which makes no express reference to present value, but rather generally instructs the jury to "compensate" plaintiff, is proper and adequate and need not be further supplemented, unless the FELA defendant requests a further proper present value instruction. It is incumbent upon the defendant railroad, if it is dissatisfied with the trial court's damage instruction, to request further, supplemental instruction on present value. In the absence of such a request by defendant railroad, a general damage instruction such as the one given in the instant case is substantively proper and adequate.

This Court's decisions clearly repudiate the unarticulated assumption upon which the Petition is based: that is, Petitioner assumes that the trial court had a duty to give a present value instruction, *sua sponte,* as a matter of federal substantive law, notwithstanding petitioner's failure to voice any dissatisfaction at trial with the damage instruction (which petitioner prepared) or to request any instruction whatsoever at trial with respect to present value. This Court's decision refutes said assumption. Petitioner has sought to obscure this deficiency by dwelling on a diversionary discussion of the retroactivity of *Dickerson,* a matter which is not really in dispute. *Dickerson* applies to all cases pending on direct appeal provided, of course, the railroad has met the substantive federal threshhold requirement for entitlement to the present value instruction—asking the trial court to give it. This petitioner did not do. Similarly, application of *Dickerson* also presupposes that the railroad defendant has properly raised the issue and preserved it under state procedural law. Petitioner, however, has also failed to do this. Petitioner seeks to obfuscate its failure to raise and preserve the issue by requesting that this Court apply the "cause and actual prejudice" standard and relieve petitioner from its procedural default. This contention completely disregards the special role and scope of habeas corpus jurisdiction as a matter of both

federal constitutional and statutory law and the broad power of the habeas court to exercise equitable power to excuse procedural defaults from the jurisdiction limitations which are rigidly observed by this Court on direct review. Petitioner's contentions are, therefore, without merit.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Honorable Court is without jurisdiction of the questions petitioner seeks to present. Apart from objections to jurisdiction, the result reached by the court below is entirely in accord with settled federal substantive law and the judgment accordingly does not warrant review by this Court. For these reasons, it is further respectfully submitted and urged that the petition for writ of certiorari in the instant case should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

[461] THE COURT: Now, I'm handing the instructions to the attorneys for their perusal, and those are the copies, and you ought to make your record now, gentlemen.

MR. FRIEDMAN [Respondent's counsel]: Your Honor, on the record, I think it should be noted and made clear that we had our settlement conference yesterday afternoon when we went through the **[462]** instructions and at that time the plaintiff offered to utilize M.A.I. 24.01 and 8.02 for FELA cases as set forth in M.A.I. At that time Mr. Tucker indicated to the Court and to me that he intended to offer instructions which are not contained in M.A.I. and which reflect the comparative fault set forth in Gustafson and which has followed thereafter.

This morning we have agreed and I have agreed not to give the M.A.I. FELA Instruction 24.01 and 8.02 and the form of verdict instruction but I have agreed to comply with Mr. Tucker's request to submit this case in the manner in which requested by Mr. Tucker and as a matter of fact plaintiff's verdict director is one that was in fact offered — and we have agreed and stipulated that these instructions would be given by agreement and by stipulation of counsel and that no issue would be raised with respect thereto in the event there's an appeal of this case.

MR. TUCKER [Petitioner's counsel]: I've agreed we can go on the contributory fault. I'm not saying any issue won't be raised.

MR. FRIEDMAN: If you're raising an issue about going under contributory fault —

MR. TUCKER: I won't raise an issue about going under contributory fault but I'm not raising any other question I have to the form of the instruction.

[463] MR. FRIEDMAN: I want the record clear that the form of the instructions, the form of the instructions that were offered by you and were given by you —

MR. TUCKER: No, I didn't offer them. I had a set here.

MR. FRIEDMAN: Which we used.

MR. TUCKER: I don't know what you used, Marshall. I can't tell you what you used, I don't know.

MR. FRIEDMAN: You withdrew — Well, then would you please bring out — we'll use your instructions.

MR. TUCKER: Well, you've submitted your instructions.

MR. FRIEDMAN: I'll use your form. You've had an opportunity to review this instruction.

MR. TUCKER: These are your instructions. I'll agree that we can go under contributory fault. I'm not waiving any other objection I have as to the form of the instructions.

MR. FRIEDMAN: Well, then I want to see the instructions that you offered because I'm going to have them marked. I'll have an instruction marked as the verdict director that's been submitted by the defendant. I'd like to have that marked as an exhibit. **I'd like to have the other instructions then which you have offered, so that it's clear in the record that these instructions that are [464] given by the Court are the identical instructions that were offered by the defendant.**

MR. TUCKER: I'll agree to that.

MR. FRIEDMAN: You'll agree that the instructions given by the Court are the identical instructions that have been offered by the defendant?

MR. TUCKER: Well, I haven't really offered them but I submitted them to the Court and they were returned to me.

THE COURT: Are they the same in wording?

MR. TUCKER: Yes.

MR. FRIEDMAN: These are being given by agreement and no issue will be raised with respect to these instructions on appeal because they've been given by agreement of both parties.

MR. TUCKER: I'll not raise any issue as to submitting the instructions on the basis of contributory fault but I'm not waiving any objections I may have to the instructions — any general objections I may have to the instructions, or specific objections.

THE COURT: You mean in that one instruction?

MR. TUCKER: Yes.

MR. FRIEDMAN: But we're giving the instruction that you offered.

MR. TUCKER: You're giving an instruction that is **[465]** the same as the one I would have offered.

MR. FRIEDMAN: That you did offer.

MR. TUCKER: No, I didn't offer it.

MR. FRIEDMAN: I have one. Could we have the other instruction that you offered?

MR. TUCKER: Now wait a second. I'm not waiving any objection to these instructions, Mr. Friedman. I'll agree that we can go on contributory fault. I agree that the instruciton you submitted is the same instruction I would have submitted, tendered, if you had gone under the old M.A.I. 24.01.

MR. FRIEDMAN: You agree that the instructions that the Court is giving in this case is in the same wording and in the same form as the instructions that you submitted to the Court and offered to the Court in the event we would have submitted under the M.A.I. 24.01?

MR. TUCKER: Yes.

THE COURT: That seems to do it.

Take a look at those instructions, genetlemen, and any objections, other than that one, —

MR. TUCKER: I would like to enter my objection to these — my general objection to these instructions. I reserve any specific objections I have until later.

MR. FRIEDMAN: I would for the record like to ask Mr. Tucker again, state on the record, that we have reviewed **[466]** all of these instructions with the Court, the form of the instructions given under comparative fault are the form that has been submitted and agreed upon by the defendant and if the defendant has any thoughts, any error or any problems with any of the instructions in this case under the recent Opinion of our Missouri Supreme Court I'm asking the defendant to advise the Court of any deficiencies or any problems with the instructions that are being given by the Court.

MR. TUCKER: I reserve my right to make any specific objections to these instructions at a later time afterwards.